

1301

No. 3752

1302

United States
Circuit Court of Appeals
For the Ninth Circuit.

OZMO OIL REFINING COMPANY, a Corporation,
and PETROLEUM PRODUCTS COMPANY, a Corporation,

Plaintiffs in Error,
vs.

COTTON & COMPANY, Incorporated,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED

SEP 21 1921

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

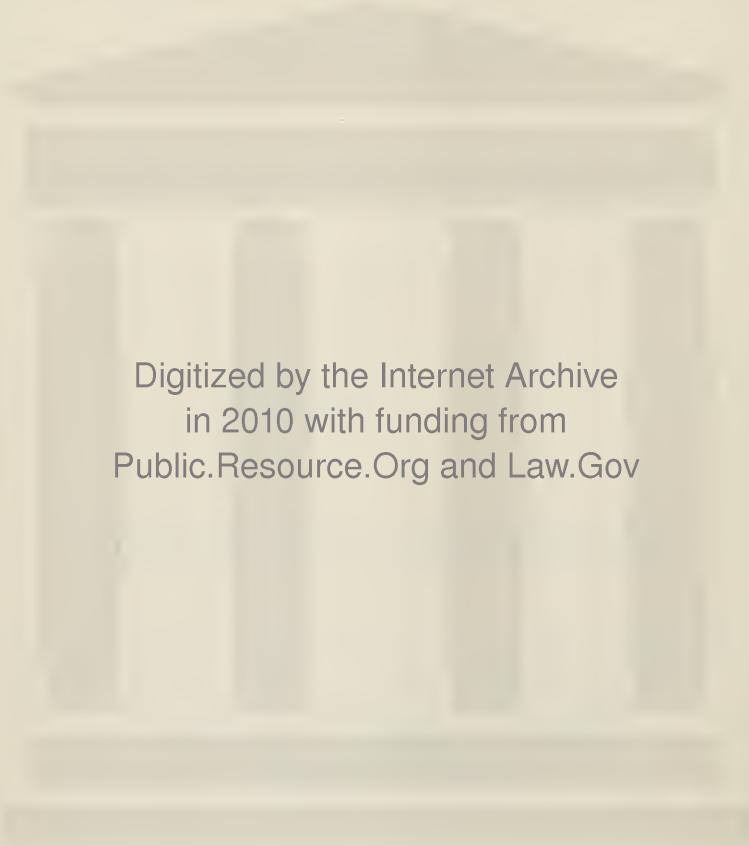
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Names and Addresses of Attorneys of Record.

WILLARD P. SMITH, Esq., Claus Spreckels
Bldg., and WALTON C. WEBB, Esq., Claus
Spreckels Bldg., San Francisco, California,
Attorneys for Plaintiff.

Messrs. THOMAS, BEEDY & LANAGAN,
Alaska Commercial Building, San Francisco,
California,
Attorneys for Defendants.

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, Second Division.

COTTON AND COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PE-
TROLEUM PRODUCTS COMPANY,
Defendants.

Complaint for Breach of Contract.

Now comes the plaintiff and for cause of action
against the above-named defendants alleges:

I.

That plaintiff is now and at all times herein
mentioned was a corporation organized and exist-
ing under and by virtue of the laws of the State
of New York, with its principal place of business
at the city and county and State of New York

and that it was by virtue of its incorporation a citizen of the State of New York.

II.

That the defendant Ozmo Oil Refining Company was at all times herein mentioned and is now a corporation duly organized and existing under and by virtue of the laws of the State of California and that it was and is a citizen of said state, with its principal office at the city and county of San Francisco, in said state.

III.

That the defendant Petroleum Products Company was at all times herein mentioned and is now a corporation duly [1*] organized and existing under and by virtue of the laws of the State of California and that it was and is a citizen of said state, with its principal office at the city and county of San Francisco, in said state.

IV.

That on or about the 11th day of October, 1918, plaintiff and defendant Ozmo Oil Refining Company entered into an agreement in writing in and by which said agreement the defendant Ozmo Oil Refining Company agreed to sell and deliver to plaintiff seven hundred tons white semi-refined wax of 105 to 108 degrees melting point, similar to sample submitted, to be packed in double headed barrels, meaning oil barrels suitable for export; that said wax was to be delivered fifty tons per month to be shipped during each and every month beginning with November, 1918, and ending with December,

*Page-number appearing at foot of page of original certified Transcript of Record.

1919; that the price of said wax was to be 9 $\frac{1}{4}$ ¢ per pound in car lots f. o. b. San Francisco, California, said price subject to a discount of one per cent, shipments to be made sight draft attached to bill of lading and payable on presentation, irrevocable credit to be established in favor of the defendant Ozmo Oil Refining Company and subject to defendant Ozmo Oil Refining Company's demand every thirty days as wax was shipped; that the following is a copy of said contract, except that the said contract was not executed and delivered upon the date appearing upon the face of the same:

"This agreement, made and entered into this fifth (5th) day of September, nineteen hundred and eighteen (1918), by and between the Ozmo Oil Refining Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, party of the first [2] part, hereinafter called the 'Seller,' and Cotton and Company of Buffalo, New York, party of the second part, hereinafter called the 'Buyer.'

WITNESSETH:

That in consideration of the promises and agreements hereinafter contained on the part of each of the parties hereto to be performed, the parties hereto do hereby agree as follows, to wit:

The Seller agrees to sell and deliver to the Buyer, and the Buyer agrees to purchase and receive from the Seller approximately Seven Hundred (700) tons of One Hundred Five (105) to One Hundred Eight (108) melting point, White Semi-refined Wax, similar to sample submitted and packed in

double headed barrels, (oil barrels, suitable for export).

DELIVERIES: Fifty (50) tons per month to be shipped during each and every month beginning with November, Nineteen Hundred and Eighteen (1918) and ending with December, Nineteen Hundred and Nineteen.

PRICE: The price of wax to be nine and one-quarter cents ($9\frac{1}{4}\text{¢}$) per pound in car lots f. o. b. San Francisco, California. The above price being subject to a discount of one per cent (1%), shipments to be made sight draft attached to bill of lading, and payable upon presentation. Irrevocable credit to be established in our favor and subject to our demand every thirty (30) days as wax is being shipped.

DAMAGE CLAUSE: Neither party hereto shall be held liable for any damage or delays occasioned by, or arising out of strikes, riots, fires, insurrections, labor disturbances, [3] Seller's inability to secure cars for product referred to, or any other clause beyond Seller's control.

All deliveries hereunder, are to be made subject to Governmental regulations, or laws governing deliveries of products specified in this agreement, and any additional costs to the Seller for making deliveries because of such regulations or laws shall be borne by the Buyer.

SUCCESSORS IN INTEREST: It is expressly understood and agreed that this agreement shall bind the successors and assigns of the prospective parties hereto without express mention.

Your acceptance of the above in the space provided below shall constitute that a binding contract between us.

OZMO OIL REFINING COMPANY,
Seller.

(Signed) E. SWIFT TRAIN,
COTTON AND COMPANY, BUFFALO,
Buyer.

(Signed) A. P. LEON,
RUTGER, BLEECKER AND COMPANY,
Brokers,
(Signed) RUTGER BLEECKER."

V.

That the plaintiff herein complied with each and every condition and term of said contract on its part to be performed, but that the said defendant Ozmo Oil Refining Company failed to deliver any of said wax and failed to comply with said contract in every and all particulars, and that the plaintiff was damaged by reason of the premises in the sum of seventeen thousand dollars (\$17,000) and no part of the same has been paid. [4]

VI.

That more than three thousand dollars (\$3,000) is involved in the controversy set forth in the complaint herein.

VII.

That prior to the execution and delivery of the contract hereinbefore set forth between plaintiff and defendant Ozmo Oil Refining Company plaintiff informed defendant Ozmo Oil Refining Company and defendant Ozmo Oil Refining Company

well knew that plaintiff was about to purchase said wax for resale and on or about the 30th day of September, 1918, and prior to the execution and delivery of said contract, plaintiff sold 600 tons of said wax to the Standard Oil Company of New York, the same to be delivered 50 tons monthly from January to December, 1919, at 10 $\frac{1}{8}$ ¢ a pound f. o. b. San Francisco, California, terms cash; that the defendant Ozmo Oil Refining Company had and was given notice of the sale of the said wax prior to the execution and delivery of said contract hereinbefore referred to between plaintiff and defendant Ozmo Oil Refining Company.

VIII.

That plaintiff sold 100 tons of said wax at 10 $\frac{1}{2}$ cents per pound in car lots f. o. b. San Francisco, California, prior to the execution and delivery of said contract to Mitsui & Company, deliverable at San Francisco, of which sale defendant Ozmo Oil Refining Company had notice prior to the execution and delivery of the contract between plaintiff and defendant Ozmo Oil Refining Company hereinbefore referred to. That the said sales to the Standard Oil Company and Mitsui & Co. were not consummated because the defendant Ozmo Oil Refining Co. did not deliver any of the wax mentioned in the agreement between itself and plaintiff.

IX.

That subsequent to the said transaction set forth in the complaint herein the defendant Ozmo Oil Refining Company [5] consolidated with the de-

fendant Petroleum Products Company and said defendant Ozmo Oil Refining Company assigned and transferred all of its assets to the defendant Petroleum Products Company and said Petroleum Products Company assumed the obligations of defendant Ozmo Oil Refining Company arising out of the contract hereinbefore set forth and said liabilities of the said defendant Ozmo Oil Refining Company and agreed to pay the same, but the same has not been paid or any part thereof.

WHEREFORE, plaintiff prays judgment against defendants in the sum of seventeen thousand dollars (\$17,000), together with interest and costs.

WILLARD P. SMITH,

Attorney for Plaintiff,

1605 Claus Spreckels Bldg., San Francisco. [6]

State of California,

City and County of San Francisco,—ss.

Willard P. Smith, being duly sworn, deposes and says:

That he is attorney for the plaintiff in the above-entitled action; that he has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and, as to those matters, he believes it to be true.

That the reason why this verification is not made by plaintiff is that plaintiff is a New York corporation and none of its officers reside or are now

within the City and County of San Francisco where affiant's office is located.

WILLARD P. SMITH,

Subscribed and sworn to before me this 10th day
of October, 1919.

[Seal]

E. J. CASEY,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 10, 1919. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, Second Division.

COTTON AND COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETROLEUM PRODUCTS COMPANY,
Defendants.

Answer.

NOW COME the defendants and answering the complaint on file herein, admit, deny and allege as follows, to wit:

I, II and III.

Admit the allegations of paragraphs I, II and III of the complaint.

IV.

Admit the allegations of paragraph IV with the

following exceptions: Deny that the contract therein set forth was made on or about the 11th day of October, 1918, and in this respect, defendants allege that said contract was made, executed and delivered on the 5th day of September, 1918. Deny that said contract was not executed and delivered upon the date appearing upon the face of the same.

And in this respect defendants allege that on or about the 29th day of August, 1918, plaintiff and defendant Ozmo Oil Refining Company entered into an agreement in writing in and by which said agreement defendant Ozmo Oil Refining Company agreed to sell and deliver to plaintiff [8] seven hundred tons white semi-refined wax of one hundred and five to one hundred eight degrees melting point similar to sample submitted to be packed in double headed barrels. That said wax was to be delivered, fifty tons per month to be shipped during each and every month beginning with November, 1918, and ending with December, 1919. That the price of said wax was to be nine and one-quarter cents per pound in car lots f. o. b. San Francisco, California, subject to a discount of one per cent, shipments to be made sight draft attached to bill of lading and payable on presentation, irrevocable credit to be established in favor of said Ozmo Oil Refining Company and subject to Ozmo Oil Refining Company's demand every thirty days as wax was shipped.

V.

Deny that plaintiff complied with each and every or each or every or any condition or term of said

contract on its part to be performed. Deny that defendant Ozmo Oil Refining Company failed to deliver any of said wax, and in this respect, defendants allege that defendant Ozmo Oil Refining Company, in accordance with said contract, offered to deliver two separate lots of said wax to plaintiff, but that plaintiff refused to accept delivery of said wax or any of it. Deny that defendant, Ozmo Oil Refining Company, failed to comply with said contract in every and all or every or all or any particulars. Deny that plaintiff was damaged by reason of the premises or otherwise in the sum of seventeen thousand dollars, or any other sum.

VI.

Admit the allegations of paragraph VI. [9]

VII.

Deny that prior to the execution or delivery of the contract thereinbefore set forth between plaintiff and defendant Ozmo Oil Refining Company, plaintiff informed defendant Ozmo Oil Refining Company or that Ozmo Oil Refining Company well or otherwise knew that plaintiff was about to purchase said or any wax for resale. Alleges that defendants have not knowledge or belief about the matter sufficient to enable them to answer, and, basing their denial on that ground, they deny that on or about the 30th day of September, 1918, or prior to the execution or delivery of said contract, plaintiff sold six hundred tons of said wax or any amount of said wax to the Standard Oil Company of New York. Deny that the same was to be delivered fifty tons or any other amount monthly,

from January to December, 1919, or any other time, at ten and one-eighth cents a pound or any other sum a pound f. o. b. San Francisco, California, or elsewhere, terms cash, or otherwise. These defendants deny that defendant Ozmo Oil Refining Company had or was given notice of said or any sale of said wax prior to the execution or delivery of said contract thereinbefore referred to.

VIII.

Allege that these defendants have not knowledge or information on the subject sufficient to enable them to answer and basing their denial on that ground, they deny that plaintiff sold one hundred tons of said wax prior to the execution or delivery of said contract to Mitsui & Company, deliverable at San Francisco, or elsewhere. These defendants deny that defendant Ozmo Oil Refining Company had notice of [10] said sale prior to the execution or delivery of the contract between plaintiff and defendant Ozmo Oil Refining Company.

IX.

Admit the allegations of paragraph IX.

WHEREFORE, these defendants pray that the plaintiff take nothing by its complaint, but that they, the said defendants, have judgment against plaintiff for their costs herein expended.

THOMAS, BEEDY & LANAGAN,
Attorneys for Defendants. [11]

United States of America,
Northern District of California.
State of California,
City and County of San Francisco,—ss.

E. Swift Train, being duly sworn, deposes and says: That he is an officers, to wit, the vice-president of Ozmo Oil Refining Company, one of the defendants in the above-entitled action. That he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters, that he believes it to be true.

E. SWIFT TRAIN.

Subscribed and sworn to before me this 28th day
of November, 1919.

[Seal] ANNE F. HASTY,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of a copy of the within answer is hereby admitted this 28th day of November, 1919.

WILLARD P. SMITH,
For Plaintiff.

[Endorsed]: Filed Nov. 28, 1919. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [12]

(Title of Court and Cause.)

**Stipulation Waiving Jury and that Matter may Go
Over for the Term.**

IT IS HEREBY STIPULATED by and between

the parties to the above-entitled action that the jury in the above-entitled case is hereby waived, and further, that this matter may be continued for the term.

Dated: May 12, 1920.

WILLARD P. SMITH,
Attorney for Plaintiff.

THOMAS, BEEDY & LANAGAN,
Attorney for Defendants.

So ordered:

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed May 13, 1920. Walter B.
Maling, Clerk. [13]

At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Wednesday, the 4th day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present, The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,296.

COTTON & CO., INC.

vs.

OZMO OIL REFINING CO., et al.

**Minutes of Court—May 4, 1921—Order Amending
Complaint, etc.**

* * * * * * *

By consent, it is ordered that the complaint may be amended on its face as follows: On page 5 at line 22 after the word, "wax" insert "at 10½ cents per pound in car lots f. o. b. San Francisco, California," ordered that said amendment be deemed denied.

* * * * * * *

The evidence being closed, counsel made their arguments to the Court, at the conclusion of which the cause being submitted and fully considered, it was ordered that judgment be entered in favor of plaintiff and against defendants upon findings to be filed. [14]

At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the court-room in the city and county of San Francisco, on Tuesday, the 17th day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,296.

COTTON & CO., INC.,

vs.

OZMO OIL REFINING CO. et al.

Minutes of Court—May 17, 1921—Order Amending Complaint, etc.

Upon motion of Willard P. Smith, Esq., and by consent of Jas. Lanagan, Esq., it is ordered that the complaint may be amended on its face as follows: On page 5 at line 27 add the following sentence to paragraph VIII, namely: "That the said sales to the Standard Oil Company and Mitsui & Co. were not consummated because the defendant Ozmo Oil Refining Co. did not deliver any of the wax mentioned in the agreement between itself and plaintiff"; and it is further ordered that said added matter be deemed to be denied. [15]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,296.

COTTON AND COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETROLEUM PRODUCTS COMPANY,
Defendants.

Decision Embracing Findings of Fact and Conclusions of Law.

This case coming on regularly for trial on the 4th day of May, 1921, before this Court sitting with-

out a jury, a jury having been expressly waived by written stipulation filed herein, Willard P. Smith, Esq., and Walton C. Webb, Esq., appearing as attorneys for Cotton and Company, Inc., the plaintiff, and James Lanagan appearing as counsel and Thomas, Beedy and Lanagan, as attorneys for the defendants, Ozmo Oil Refining Company and Petroleum Products Company, and evidence, oral and documentary, having been offered upon each and all of the allegations and issues in said action, and the same cause having been thereupon submitted to the Court for its consideration and decision and the Court having fully considered all the matters both of law and fact submitted to it and being fully advised in the premises, now makes and renders its decision herein embracing its findings of fact and conclusions of law as follows, to wit: [16]

FINDINGS OF FACT.

The Court finds as follows:

I.

That plaintiff is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business at the City and County and State of New York, and that it was by virtue of its incorporation a citizen of the State of New York.

II.

That the defendant, Ozmo Oil Refining Company, was at all times herein mentioned and is now a corporation duly organized and existing under and by

virtue of the laws of the State of California and that it was and is a citizen of the said State of California, with its principal office at the city and county of San Francisco, in said state.

III.

That the defendant, Petroleum Products Company, was at all times herein mentioned and is now a corporation duly organized and existing under and by virtue of the laws of the State of California and that it was and is a citizen of said state, with its principal office at the city and county of San Francisco, in said state.

IV.

That on the 14th day of October, 1918, plaintiff and defendant, Ozmo Oil Refining Company, entered into an agreement in writing reading as follows:

"This agreement, made and entered into this fifth (5th) day of September, nineteen hundred and eighteen (1918), by and between the Ozmo Oil Refining Company, a corporation, [17] duly organized and existing under and by virtue of the laws of the State of California, party of the first part, hereinafter called the 'Seller,' and Cotton and Company of Buffalo, New York, party of the second part, hereinafter called the 'Buyer,'

WITNESSETH:

That in consideration of the promises and agreements hereinafter contained on the part of each of the parties hereto to be performed, the parties hereto do hereby agree as follows, to wit:

' The Seller agrees to sell and deliver to the Buyer,

and the Buyer agrees to purchase and receive from the Seller approximately Seven Hundred (700) tons of One Hundred Five (105) to One Hundred Eight (108) melting point, White Semi-refined Wax, similar to sample submitted and packed in double headed barrels (oil barrels, suitable for export).

DELIVERIES: Fifty (50) tons per month to be shipped during each and every month beginning with November, nineteen hundred and eighteen (1918) and ending with December, nineteen hundred and nineteen.

PRICE: The price of wax to be nine and one-quarter cents ($9\frac{1}{4}$ ¢) per pound in car lots f. o. b. San Francisco, California. The above price being subject to a discount of one per cent (1%), shipments to be made sight draft attached to bill of lading, and payable upon presentation. Irrevocable credit to be established in our favor and subject to our demand every thirty (30) days as wax is being shipped.

DAMAGE CLAUSE: Neither party hereto shall be held liable for any damage or delays occasioned by, or arising out of strikes, riots, fires, insurrections, labor [18] disturbances, Seller's inability to secure cars for product referred to, or any other clause beyond Seller's control.

All deliveries hereunder, are to be made subject to Governmental regulations, or laws governing deliveries of products specified in this agreement, and any additional costs to the Seller for making

deliveries because of such regulations or laws shall be borne by the Buyer.

SUCCESSORS IN INTEREST: It is expressly understood and agreed that this agreement shall bind the successors and assigns of the prospective parties hereto without express mention.

Your acceptance of the above in the space provided below shall constitute that a binding contract between us.

OZMO OIL REFINING COMPANY,

Seller.

(Signed) E. SWIFT TRAIN.

COTTON AND COMPANY, BUFFALO,

Buyer.

(Signed) A. P. LEON.

RUTGER, BLEECKER AND COMPANY,

Brokers.

(Signed) RUTGER BLEECKER."

V.

That the plaintiff complied with all and every condition and term of said contract on its part to be performed, but that the defendant, Ozmo Oil Refining Company, failed to deliver any of said wax mentioned in said contract and failed to comply with said contract in every and all particulars.

VI.

That more than three thousand dollars (\$3,000) is involved in the controversy set forth in the complaint herein. [19]

VII.

That on or about the 30th day of September, 1918, and prior to the execution and delivery of

said agreement between the plaintiff and the defendant, Ozmo Oil Refining Company, plaintiff sold 600 tons of said wax to the Standard Oil Company of New York, the same to be delivered 50 tons monthly from January to December, 1919, at 10 $\frac{1}{8}$ cents a pound in car lots, f. o. b. San Francisco, California, terms cash, which sale was not consummated because the defendant, Ozmo Oil Refining Company, did not deliver any of the wax mentioned in the agreement between itself and the plaintiff.

VIII.

That plaintiff prior to the execution and delivery of said agreement between itself and the defendant, Ozmo Oil Refining Company, sold 100 tons of said wax to Mitsui & Company, the same to be delivered 50 tons monthly in November and December, 1918, at 10 $\frac{1}{2}$ cents a pound in car lots, f. o. b. San Francisco, California, which sale was not consummated because the defendant, Ozmo Oil Refining Company, did not deliver any of the wax mentioned in the agreement between itself and the plaintiff.

IX.

That prior to the execution and delivery of said agreement between plaintiff and the defendant, Ozmo Oil Refining Company, said defendant well knew and plaintiff informed it that plaintiff was about to purchase the wax mentioned in said agreement for resale and had resold the same, and that on September 17, 1918, plaintiff notified defendant, Ozmo Oil Refining Company, by letter that it intended to offer the wax in question for sale and on

September 30, 1918, it telegraphed defendant, Ozmo Oil Refining Company, that it had sold the [20] wax to responsible parties and on October 3, 1918, it wrote defendant, Ozmo Oil Refining Company, that the wax had been resold to responsible parties, which letter defendant, Ozmo Oil Refining Company, received on October 9, 1918, and on October 8, 1918, plaintiff wrote defendant, Ozmo Oil Refining Company, that it had sold the wax to the Standard Oil Company of New York and Mitsui & Company, which letter defendant, Ozmo Oil Refining Company, received on October 14, 1918.

X.

That subsequent to the said transaction set forth in the complaint herein the defendant, Ozmo Oil Refining Company, consolidated with the defendant, Petroleum Products Company, and said defendant, Ozmo Oil Refining Company, assigned and transferred all of its assets to the defendant, Petroleum Products Company, and said Petroleum Products Company assumed the obligations of defendant, Ozmo Oil Refining Company, arising out of the contract hereinbefore set forth and said liabilities of the said defendant, Ozmo Oil Refining Company, and agreed to pay the same, but the same has not been paid or any part thereof.

XI.

That the total price to be paid by the plaintiff under said contract for said 700 tons of match wax, at $9\frac{1}{4}\text{¢}$ a pound, was \$129,500; that the resale price of 600 tons of said wax to the Standard Oil Company of New York, at $10\frac{1}{8}\text{¢}$ a pound, was \$121,500;

that the resale price of 100 tons of said wax, at 10½¢ a pound, to Mitsui & Company was \$21,000; that the total resale price of said wax was \$142,500; that the difference between the contract price and the resale price was \$13,000; that said match wax was to be delivered monthly from November 30, 1918, to December [21] 31, 1919, payable cash on delivery by said purchasers, Standard Oil Company of New York and Mitsui & Company of San Francisco; that the average due date of said payments of said wax would be May 31, 1919.

XII.

That plaintiff has been damaged by reason of the premises in the sum of \$13,000, and interest from May 31, 1919, no part of which has been paid.

CONCLUSIONS OF LAW.

And as conclusions of law from the foregoing facts the Court finds and decides that plaintiff, Cotton and Company, Inc., is entitled to judgment against the Ozmo Oil Refining Company and Petroleum Products Company, the defendants, and each of them, in the sum of \$13,000 and interest from May 31, 1919, and costs to be taxed.

Let judgment be entered accordingly.

Done in open court this 17th day of May, 1921.

WM. C. VAN FLEET,

Judge.

Receipt of a copy of the within decision is hereby admitted this 17th day of May, 1921.

THOMAS, BEEDY & LANAGAN,

Attys. for Defts.

[Endorsed]: Filed May 18, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

(Title of Court and Cause.)

Judgment on Findings.

This cause having come on regularly for trial upon the 4th day of May, 1921, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed, Willard P. Smith and Walton C. Webb, Esqs., appearing as attorneys for plaintiff and James Lanagan, Esq., appearing at attorney for defendants; and the trial having been proceeded with and oral and documentary evidence on behalf of the respective parties having been introduced, and the evidence having been closed and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having filed its findings in writing and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Cotton and Company, Inc., plaintiff, do have and recover of and from Ozmo Oil Refining Company and Petroleum Products Company, defendants, the sum of fourteen thousand seven hundred eighty-seven and 15/100 (\$14,787.15) dollars, together with its costs herein expended taxed at \$78.70.

Judgment entered May 18, 1921.

WALTER B. MALING,

Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

[Endorsed]: Filed May 18, 1921. Walter B. Maling, Clerk. [23]

(Title of Court and Cause.)

(Clerk's Certificate to Judgment-roll.)

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 18th day of May, 1921.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed May 18, 1921. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[24]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

Before Hon. WM. C. VAN FLEET, Judge.

No. 16,296.

COTTON & COMPANY,

Plaintiff,

vs.

OZMO OIL REFINING CO. et al.,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that this case came on regularly for trial in the above-entitled court on Wednesday, May 4, 1921, before the Honorable William C. Van Fleet, Judge of said court, without a jury. There appeared for the plaintiff Willard P. Smith, Esq., and Walton C. Webb, Esq., and for the defendants, Messrs. Thomas, Beedy & Lanagan.

The following proceedings were had:

Mr. SMITH.—In the complaint, on page 5, we have stipulated to amend, and would like to amend on the face of the complaint; there are only a few words to go in there. It is consented to by Mr. Lanagan for the defendant.

The COURT.—What is the proposition?

Mr. SMITH.—On page 5 of the complaint, paragraph 8, it reads:

“That plaintiff sold 100 tons of said wax prior to the execution and delivery of said contract.” [25]

We want to insert the price; we left out the price. We want to insert, “at 10½ cents per pound, in car lots, San Francisco.”

The COURT.—Very well, if there is no objection.

Mr. LANAGAN.—There is no objection, your Honor, but may we consider that that is denied?

The COURT.—Yes. Is this an action for damages?

Mr. SMITH.—This is an action for damages for breach of contract.

The COURT.—Is it without a jury? Has a jury been waived?

Mr. SMITH.—Yes, your Honor, a jury has been waived by a filed stipulation.

I will read, first, the deposition of CLAIR H. COTTON. This deposition was taken by stipulation, and all objections except as to the form of question were reserved.

Deposition of Clair H. Cotton, for Plaintiff.

My name is Clair H. Cotton. I reside at East Aurora, New York. My business address is 511 Liberty Building, Buffalo, New York. I am president of Cotton & Company, the complainant in this action. I was president in 1918. The company was engaged in business in Buffalo with a branch sales office at 37 Liberty Street, New York. Its business was the buying and selling of oils and wax as jobbers. I know the firm of Rutger, Bleecker & Company. They were brokers in 1918 in New York City. Cotton & Company at that time did no manufacturing, and oils or other material that it bought were bought for the purpose of resale only. Prior to August, 1918, the company had made inquiries from Rutger, Bleecker & Company and had received offers from them from time to time, but I cannot say whether any transactions had ever been closed with them before. I personally had nothing whatever to do with making this purchase through Rutger, Bleecker & Company, which is the subject of this action. I was in [26] New York in the latter part of September, 1918, more or less a great deal of the time, but I know I was there about the 25th, I may have got there a day or two before. I

(Deposition of Clair H. Cotton.)

know I was there about the 25th day of September, 1918. Mr. Leon, our sales manager, and myself met Mr. Salisbury of the Standard Oil Company in the lobby of the Hotel Astor. In the course of the conversation Mr. Salisbury asked me, us, what we were doing, what we had for sale, if we were doing any business. I replied to him that we had a substantial quantity of 105-108 melting point wax for sale and asked if he was interested. His answer to that was an inquiry where this match wax was located. I told him in San Francisco. He said he might be interested in the purchasing of match wax in San Francisco and that if we would make him a price and let him have it firmly in hand for a few days, I think until the following Saturday, that he thought he would buy it. He then asked us what the price was, and as Mr. Leon was our sales manager there, I looked at him and he replied 10 $\frac{1}{8}$ ¢ a pound f. o. b. San Francisco. That was substantially all of the conversation that took place at that time as far as I remember. That was the first talk that I had anything to do with anyone representing the Standard Oil Company in connection with this particular sale. I sold the Standard Oil Company before. Subsequently I returned to Buffalo. The original contract was made up in our office in New York, submitted to the Standard Oil Company and signed by one of their directors, Mr. Cole. It was customary for our New York office to always submit to us or send to us the original contract, together with an office copy. This original

(Depositions of Clair H. Cotton.)

contract and a copy were received at Buffalo on or about October 2d. The date of the stamp on the copy tells the exact date. I think it was October 2d. [27]

Q. Will you tell what efforts you have made to find the original contract?

A. Well, during the negotiations, and before the contract of the Ozmo Oil Refining Company was finally closed, they requested us to open a letter of credit, and in order to open this letter of credit it was necessary for us to have the original signed contract of the Standard Oil Company to submit to the bank, which we did, and that it was kept by the bank for several months, in fact, all the time this letter of credit was in existence, and it was in existence from the time it was opened until the contract was finally canceled. Since that time, I have tried to get the contract from the Buffalo Trust Company, and they are unable to locate it. The document you show me is a copy of the original contract made with the Standard Oil Company and sent here from our New York office together with the original. The original was signed for the Standard Oil Company by Mr. Cole. I was familiar with his signature. The document is as follows:

Plaintiff's Exhibit "A."**MERCHANDISE CONTRACT.****COTTON & COMPANY, INC.**

Office at New York City.

No. 133.

Date Sept. 30/18.

Standard Oil Co. of New York,

26 Broadway,

New York City.

We have this day sold you

Through _____

Commodity—PARAFFINE WAX.

Quantity —Six hundred (600) tons of two thousand (2,000) pounds each, (five per cent (5%) more or less).

Quality — $105/8^{\circ}$ M. P., White.

Packing —Tight, double-head barrels, suitable for export.

Shipment —Fifty tons (50) monthly, January to December, 1919, both months inclusive.

Price —Ten and one-eighth cents ($10\frac{1}{8}\text{¢}$) F. O. B. San Francisco, Cal., per pound.

Weights —Shipped gross weights, less invoice tares.

Payment —Net cash, upon presentation of documents.

Shipping Instructions—To be furnished promptly by the buyers.

Conditions.— [28]

This sale is based upon the present regulations of the Federal, State and Municipal Governments, their departments and bureaus, and the present tariffs, taxes, duties, levies, imposts, assessments, freight rates, internal revenue and custom-house classifications and regulations, and any increased burden therein to be for buyer's account. In consideration of this sale, the buyer releases the seller from any liability or responsibility for delays, defaults or events growing out of contingencies beyond the seller's control, and the same shall not constitute a breach of contract nor exempt the buyer from accepting later shipments or deliveries. The seller shall not be liable for loss growing out of inability to secure facilities for moving shipment and while awaiting transportation, all loss in weights, charges for storage, labor, insurance or other expenses or losses incurred in handling shall be for buyer's account. Should any part of the merchandise above mentioned be jettisoned or lost at sea or while loading or *en route* or during discharge or while being transferred from one common carrier to another, or pending removal from the point of discharge, this sale is void to the extent of the loss. Deliveries within five per cent more or less of the amount of goods herein specified shall constitute fulfillment. A judgment obtained against the buyer, or his bankruptcy or insolvency or default in the payment of goods delivered by the seller on this or any other contract, or any other failure to comply with any of the terms of this or any other contract between the parties shall relieve the seller at his option as

to all portions of the contract undelivered. It is agreed between the parties that the goods above specified shall be separated into monthly shipments, each of which shall constitute a separate contract. No claim regarding quality shall be made unless ten per cent of the original unopened package be produced. This transaction is made under representation by the undersigned that there is not involved in connection therewith any trading directly or indirectly with, to, from, for or on account, behalf or benefit of any enemy or ally of any enemy of the United States or any transaction violative of the trading with the enemy act of the United States.

Accepted Oct. 2, 1918.

COTTON & COMPANY, INC.

By _____.

United States.

License

No.

G-08752

Food Administration.

Mr. A. P. Leon was sales manager in charge of our New York office. Most of the correspondence passed between our New York office and the Ozmo Oil Refining Co. in connection with this transaction. On September 26th I received a telegram from the Ozmo Oil Refining Company, which you now show me, addressed to Cotton & Company, Buffalo, New York. This telegram was as follows: [29]

Plaintiff's Exhibit "B."

WESTERN UNION TELEGRAM.

A666CH 34 NL.

1918, Sep. 25 PM 11 36.

San Francisco, Calif, 25.

Cotton & Co.,

Buffalo, New York.

In reference to tax contract will you be kind enough to establish irrevocable credit in our favor with your bank in order that the sight drafts may be taken up when presented and due.

OZMO OIL REFINING CO.

After receipt of that telegram I made arrangements with the Buffalo Trust Company for establishing this irrevocable letter of credit. On the 14th of October I communicated with the Ozmo Oil Refining Co. in regard thereto by a night letter, of which a copy is as follows:

Plaintiff's Exhibit "C."

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., October 14th, 1918.

NIGHT LETTER.

Ozmo Oil Refining Company,

San Francisco, Cal.

Signed contracts received and irrevocable letter of credit opened Buffalo Trust Company Buffalo, New York who will forward same direct to you Kindly arrange with Curtiss and Tompkins Chemists San Francisco to make analysis of each shipment and

forward their certificate attached your draft This
for our account.

COTTON COMPANY, INC.

Charge Cotton & Company, Inc.

At the same time I received a letter from the Standard Oil Company with reference to its contract with us, with shipping instructions. The letter was dated October 14th, and it and the shipping instructions were received at the New York office and later sent on to me at Buffalo. The letter and shipping instructions are, as follows:

Plaintiff's Exhibit "D."

Letter-head

STANDARD OIL COMPANY OF NEW YORK.

New York, October 14th, 1918.

Subject:

Orders covering 600
tons 105/108 White Wax.

Messrs. Cotton & Co., Inc.,

37-39 Liberty Street,

New York City. [30]

Dear Sirs:

We are enclosing herewith our orders Nos. 3539 to 3550 calling for total of 600 tons 105/108° White Wax, covered by our Purchase Contract with you dated Sept. 30th.

We are to-day forwarding copies of these orders to Mr. S. G. Casad, Standard Oil Co. (California) San Francisco, Cal.

Yours very truly,

H. E. COLE.

A.

General Foreign Order No. 3540.

New York, October 11, 1918.

Messrs. Cotton & Co.,

37-39 Liberty Street,

New York City.

Please deliver to S/S — Shipping Instruction Memo. No. —, Dated —. Pier —. Calls for Delivery, February, 1919. Port mark—Kobe.

Purchase Contract No.	Foreign Office Order No.	Packages. Num- ber.	Kind.	Merchan- dise.	Brand.	Marks and Numbers.	Remarks.
Stock	50	Tons 105/108 2000 lbs.	M. P. Match 3% Oil & moisture	White	Match Wax	[C]	1/up
						▽	

Charge S. O. Co. of N. Y. Asiatic Consignment. Mail Invoice and address correspondence to H. E. Cole, Room 1306, 26 Broadway, N. Y.

To be packed in double-headed barrels, suitable for export.

Shipment to be made in the name of the Standard Oil Co. of New York consigned to Mr. S. G. Casad, Standard Oil Co., California, 200 Bush St., San Francisco, Cal.

For Export Lighterage Free.

Bills of Lading to be mailed to Mr. S. G. Casad, Standard Oil Co., California, 200 Bush St., San Francisco, Cal.

PLEASE FURNISH BILLS IN DUPLICATE.
CHARGE ASIATIC CONSIGNMENT AC-
COUNT AND PLEASE FURNISH DUPLI-
CATE WEIGHT RETURNS.

Packages for each port must be stowed separately
on lighter in such manner that they may be delivered
by ports (each port separately) in the order re-
quired as shown in Shipping Instructions which are
to follow.

If any of above parcels are short shipped, notify
N. Y. office to cancel and they will issue new [31]
order if necessary.

It is of utmost importance that we be notified
immediately upon receipt of order of any shortage,
so that an additional quantity may be ordered to
take place of quantity short.

CLAUSE.

Goods Manufactured in U. S. A. NOT to appear
on packages.

We will furnish you with Shipping Instruction
Memo. on or about —, 191—, giving you at least
3 days' notice of required delivery.

STANDARD OIL CO. of N. Y.
Export Order and Sales Dept., Room 1204.

C. L. C.

Per _____.

General Foreign Order No. 3539.

New York, October 11, 1918.

Messrs. Cotton & Co.,
37-39 Liberty Street,
New York City.

Please deliver to S/S — Shipping Instruction
Memo. No. —, Dated —. Pier —. Calls for
Delivery, January, 1919. Port Mark—Kobe.

Purchase Contract No.	Foreign Office Order No.	Packages. Num- ber. Kind.	Merchan- dise.	Marks and Brand. Numbers.	Remarks.
Stock	20	Tons 105/108 M. P. Match 2000 lbs. White 3% Wax Oil & Moisture		[C] V	1/up

To be packed in double-headed barrels, suitable for export.

Shipment to be made in the name of the Standard Oil Co. of New York consigned to Mr. S. G. Casad, Standard Oil Co., California, 200 Bush St., San Francisco, Cal.

For Export Lighterage Free.

Bills of Lading to be mailed to Mr. S. G. Casad, Standard Oil Co., California, 200 Bush St., San Francisco, Cal.

PLEASE FURNISH BILLS IN DUPLICATE.

Charge S. O. Co. of N. Y. Asiatic Consignment.
Mail Invoice and address correspondence to H. E. Cole, Room 1306, 26 Broadway, N. Y.

CHARGE ASIATIC CONSIGNMENT ACCOUNT AND PLEASE FURNISH DUPLICATE OF WEIGHT RETURNS.

Packages for each port must be stowed separately on lighter in such manner that they may be delivered by ports (each port separately) in the order required as shown in Shipping Instructions which are to follow. [32]

If any of above parcels are short shipped, notify N. Y. office to cancel and they will issue new order if necessary.

It is of utmost importance that we be notified immediately upon receipt of order of any shortage, so that an additional quantity may be ordered to take place of quantity short.

CLAUSE.

Goods Manufactured in U. S. A. NOT to appear on packages.

We will furnish you with Shipping Instruction Memo. on or about —, 191—, giving you at least 3 days' notice of required delivery.

STANDARD OIL CO. OF N. Y.

Export Order and Sales Dept.,

Room 1204.

CLC.

I subsequently received the letter of January 31st from the Standard Oil Company now shown me. That letter is as follows:

Plaintiff's Exhibit "E."

Letter-head

STANDARD OIL COMPANY OF NEW YORK.

New York, January 31st, 1919.

Subject:

Deliveries against Contract #133
covering 50 tons Match Wax
monthly during year 1919.

Messrs. Cotton & Co., Inc.,

37-39 Liberty Street,

New York City.

Dear Sirs:

We confirm herewith recent conversation with

Mr. Mauresberg, of your Company, in which he took the stand that it was in order for your Company to tender to us the monthly portion of our Contract #133 in New York or any other city.

This is not in accordance with the terms of the contract, which contemplates the tendering to us in San Francisco of 50 tons, each month—beginning January, 1919, at price of $10\frac{1}{8}$ cts. per lb. f. o. b. steamer, San Francisco, Cal.

We understand from the Standard Oil Co. (California) that you have made tender of the January quantity but that same tested 15.76% moisture instead of 3% as per contract.

This tender was not in accordance with the contract and was, of necessity, rejected.

We have not heard from Mr. S. G. Casad of the Standard Oil Co. (California), San Francisco, Cal., who is attending to the bookings of export freight for our account, as to whether or not a legal tender has been made of the 50 tons in question, for shipment by us during the month of January.

Unless, therefore, tender is made for shipment [33] on or before February 10th, we will be compelled to cancel the January portion of this contract.

In extending the time to Feb. 10th in the present instance, same is not to be considered as a precedent for extensions of any other deliveries in any subsequent months, and is done without prejudice to our rights under the contract of receiving 50 tons in January and each of the subsequent months, up to and including December, 1919.

You will therefore please accept this letter as

(Deposition of Clair H. Cotton.)

notice upon you to the effect that unless the 50 tons for January are tendered us at San Francisco, for export shipment on or before Feb. 10th, same is cancelled forthwith, and unless subsequent monthly quantities are tendered at San Francisco for export shipment within the months named, they are likewise cancelled from the total quantity of this contract.

Trusting you will advise us promptly as to what tender you have made for shipment by us from San Francisco, during the month of January and what tender you expect to make at San Francisco for shipment by us during the month of February, we are,

Yours very truly,

H. E. COLE,

W.

WRW:EP.

None of the wax called for by the contract with the Ozmo Company was delivered to Cotton and Company nor to those to whom it had resold in the month of November. Nothing was delivered or tendered in the month of November or December. With reference to the delivery or tender of the wax we had telegraphed demanding delivery and the Ozmo had promised us continuously that they would make delivery. They finally stated that they would be late in making delivery, and when the tender of the wax was finally made that did not meet with specifications, the wax was rejected by the Standard Oil Company. Some correspondence ensued between our company and the Ozmo Oil Company in

(Deposition of Clair H. Cotton.)

regard to that which is contained in this file of correspondence. It shows the subsequent dealings that we had with the Ozmo Company in efforts to obtain delivery. In general, the correspondence showed that their attitude at all times was that they would make delivery as soon as they could get it, and they kept promising us that we could expect delivery in a short time, sometimes they said we will be able to deliver on stipulated date, which shows by the correspondence, and [34] I cannot remember them.

Q. Did you attempt to buy any of this wax on the market?

A. We made inquiry but did not dare make purchases in view of the fact that they insisted they were going to compel us to take delivery of this wax which they claimed all the time they could furnish. Our contract with the Standard Oil Company was finally cancelled by the Standard Oil Company. The reason given was that we had failed to make delivery in accordance with the specifications, and that they had lost valuable freight space which had advanced since they had engaged it, and that they could not accept delivery for these two reasons. They gave us on one or two occasions an extension until the tenth of the following month within which to perform, but no delivery was made either then or in time for us to make the tender to them, and when tenders were finally made, as I said before, the wax was not up to specifications and was refused on that account. We received the contract

(Deposition of Clair H. Cotton.)

of the Ozmo Oil Company in its final form on October 14, 1918. I fixed that date because we immediately telegraphed the Ozmo that the contracts had been received and that the irrevocable letter of credit had been opened through the Buffalo Trust Company in their favor. Our contract with the Standard Oil Company was in car lots. Just a minute; it was stipulated that this delivery was to be made 50 tons a month, but in carload lots. I drew our contract with the Standard Oil which specifies for shipments 50 tons a month. That contemplates delivery in carload lots. We were not to be put to any expenses in handling that under our contract with the Standard Oil Company. During the time that the negotiations were being carried on with reference to this contract I was frequently back and forth from New York City. The character of the negotiations and proposed changes were reported [35] to me every week. The Mitsui Company referred to in Mr. Leon's testimony as one of the concerns to whom part of this wax was sold has an office in San Francisco, Seattle and New York to my knowledge. Their head office is in Japan. This sale was made to their San Francisco office. I had no knowledge of that until after, later. That was a written contract. I have not the written contract here unless it is in the file. The Mitsui Company has a duplicate in San Francisco.

Cross-examination.

I had nothing to do with the alleged negotiations concerning the purchase of the wax in question

(Deposition of Clair H. Cotton.)
from the defendant. My New York sales manager, A. P. Leon, conducted these negotiations. The negotiations were first started between Mr. Leon for us and Mr. Rader of Rutger, Bleecker & Co., by telephone. I understand that there was a letter then written by the Rutger Bleecker Co. to our company dated August 29, 1918. The letter is the same as you now show me. The letter is as follows:

Defendants' Exhibit "A."

Letter-head
RUTGER, BLEECKER & Co.,
New York.

August 29th/1918.

The Cotton Co.,
37 Liberty St.,
New York City.

Gentlemen:

Attention of Mr. Leon.

We hereby confirm having sold to you for account of sellers on the Pacific Coast, who we believe are the Osmo Oil Refining Co, San Francisco but subject to correction if any, 50 tons of Paraffine Wax monthly from November 1918, to December 1919 inclusive, in all 700 tons, quality—White Semi Refined, 105 to 108 degrees melting point not over 3% oil and moisture packed in tight barrels at 9 $\frac{1}{4}$ ¢ per lb. F. O. B. San Francisco, terms Net cash sight draft with bills of lading attached Pacific coast weights.

Official contract is being forwarded by our San

Francisco office and in the meantime as confirmation we would suggest that you sign duplicate letter attached herewith.

Yours very truly,

RUTGER, BLEECKER & CO.

Per B. RADER.

BR:MM. [36]

Our company in reply to that letter wrote to Rutger, Bleecker Co. on August 31st. Our letter is as follows:

Defendants' Exhibit "B."

August 31, 1918.

Rutger, Bleecker & Co.,

#87 Wall St.,

New York City.

Attention Mr. Rader.

Gentlemen:

We have your favor of the 29th inst., and confirm having purchased, through you, from the Ozmo Oil Refining Co., of San Francisco,

Seven hundred tons of Paraffine Wax, white, semi-refined, 105/8° M. P., containing not over 30% oil and moisture, packed in double head barrels, for shipment fifty tons monthly, from November, 1918, to December, 1919, inclusive, at 9 1/4¢ per lb. fob. San Francisco.

Terms net cash, sight draft attached bills of lading; Pacific Coast, gross weights less actual tares, as per licensed weighmaster's returns.

(Deposition of Clair H. Cotton.)

We are returning signed copy of your confirmation, as per your request, and await contracts, in order that we may send confirming purchase order.

Trusting that we shall be able to put through some more business together, before long, we are

Yours very truly,

COTTON & COMPANY, INC.

APL.BS.

Sales Manager.

After those letters there was a contract entered into between the complainant and defendant. The contract in question was the contract prior to the one that my counsel has referred to in his direct examination. I don't know anything about any contract other than the one my counsel referred to in his direct examination. The only contract that I recall is a contract dated the 5th day of September. It may be possible that another form was submitted, but if it was, it was returned without my knowledge of its having been received, so far as I can recall now. [37] So far as I know, the only contract between the complainant and defendant is this contract dated the fifth of September. That contract was from time to time modified. This contract was made pursuant to the correspondence and conferences between the complainant and Rutger, Bleecker & Co. as set forth in the exhibits, comprising letters which have been offered in evidence on the part of the defendant.

Q. And this contract in question is the paper which I show you?

(Deposition of Clair H. Cotton.)

A. This contract here was not a completed contract until after these corrections were made.

It was the contract in question dated September 5th, the one we have been referring to with the modifications later made. It was as follows:

Defendants' Exhibit "C."

THIS AGREEMENT, made and entered into this fifty (5th) day of September, Nineteen Hundred and Eighteen (1918) by and between the OZMO OIL REFINING COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of California, party of the first part, hereinafter called the "Seller," and COTTON AND COMPANY of Buffalo, New York, party of the second part, hereinafter called the "Buyer,"

WITNESSETH:

That in consideration of the promises and agreements hereinafter contained on the part of each of the parties hereto to be performed, the parties hereto do hereby agree as follows, to wit:

The seller agrees to sell and deliver to the Buyer, and the Buyer agrees to purchase and receive from the Seller approximately Seven Hundred (700) tons of One Hundred Five (105) to One Hundred Eight (108) melting point, White Semi-refined Wax, similar to sample submitted and packed in double headed barrels, (oil barrels, suitable for export).

(Deposition of Clair H. Cotton.)

DELIVERIES: Fifty (50) tons per month to be shipped during each and every month beginning with November, Nineteen Hundred and Eighteen (1918) and ending with December, Nineteen Hundred and Nineteen.

PRICE: The price of wax to be nine and one quarter cents ($9\frac{1}{4}\%$) per pound in car lots f. o. b. San Francisco, California. The above price being subject to a discount of one per cent (1%), shipments to be made sight draft attached to bill of lading, and payable upon presentation. Irrevocable credit to be established in our favor and subject to our demand every thirty (30) days as [38] was is being shipped.

DAMAGE CLAUSE: Neither party hereto shall be held liable for any damage or delays occasioned by, or arising out of strikes, riots, fires, insurrections, labor disturbances, Seller's inability to secure cars for product referred to, or any other cause beyond Seller's control.

All deliveries hereunder, are to be made subject to Governmental regulations, or laws governing deliveries of products specified in this agreement, and any additional costs to the Seller for making deliveries because of such regulations or laws shall be borne by the buyer.

SUCCESSORS IN INTEREST: It is expressly understood and agreed that this agreement shall bind the successors and assigns of the prospective parties hereto without express mention.

Your acceptance of the above in the space pro-

(Deposition of Clair H. Cotton.)

vided below shall constitute this a binding contract between us.

OZMO OIL REFINING COMPANY,

Seller.

E. SWIFT TRAIN.

COTTON AND COMPANY, BUFFALO,

Buyer.

A. P. LEON.

RUTGER, BLEECKER AND COMPANY,

Brokers.

RUTGER BLEECKER.

We began our conferences with the Standard Oil Company somewhere around September 25th.

Q. And on the 14th of October the Standard Oil Company sent you orders for the purchase of 600 tons of white wax?

A. No, they are not orders. They are simply shipping instructions. They are instructions to ship in reference to a contract made September 30th. We have a copy of that contract made September 30th marked in evidence. I refer to Complainant's Exhibit "A" marked for identification as being a copy of the contract between complainant and the Standard Oil Company. The original contract shows an acceptance by the Standard Oil Company. I say that the Buffalo Trust Company, who had the original contract the last I know of, have been unable to locate it so far. [39]

Q. What you term as being shipping instructions from the Standard Oil Company, attached to Complainant's Exhibit "B" marked for identification,

(Deposition of Clair H. Cotton.)

call for according to the letter thereto attached, 600 tons white wax. Is that right?

A. No. This letter refers to our contract and these shipping instructions call for 50 tons of 2,000 lb. each. These are the original shipping instructions received by us. These shipping instructions were not signed by any officer of the Standard Oil Company, but only by the Standard Oil Company's printed signature. There is a place for a signature by the person having the matter in charge, and that signature is in blank.

The contract between the complainant and defendant bearing date September 5, 1918, was delivered to us around about the 14th of October, 1918.

Q. That is the time that you wish to have the contract effective? Is that correct?

A. That is correct, yes. At this time we had resold 100 tons to Mitsui & Company, San Francisco, six hundred tons had been sold to the Standard Oil. I think the Mitsui contract is in my attorneys' hands in San Francisco. I do not know when we sold to Mitsui. That transaction with Mitsui was handled entirely by the New York office. I would have to examine the telegram sent to the defendant to tell when we gave notice of a resale to the defendant. I do not know if that telegram was sent from this office or from New York, but a telegram was sent notifying them of the resale. I don't recall the date without refreshing my memory. It was sent before the completion of the contract between the complainant and the defendant. I don't know if

(Deposition of Clair H. Cotton.)

I sent it, without examination of the correspondence, because I don't know if it was sent from New York or Buffalo. I did not testify that it [40] was sent before the contract was made, but because that is my memory of it. That telegram was sent by our New York office. The contract wax was referred to in the telegram. Our contract was not in existence at the time this was sent. Thereupon the telegram was introduced in evidence. It was as follows:

Defendants' Exhibit "F."

POSTAL TELEGRAPH—TELEGRAM.

1:35 P. M., September 30, 1918.

Ozmo Oil Refining Co.,
San Francisco, Cal.

Referring our contract wax is this material packed tight iron hooped oil barrels If not wire exact packing mentioning material number hoops etc Do you require bank guarantee entire contract or monthly Perfectly willing cooperate with you but in return must ask you post guarantee for performance contract This material sold responsible buyers Reply immediately Thirty-seven liberty street.

COTTON & COMPANY, INC.

Charge.

We received a telegram dated September 25th sent by the Ozmo Oil Refining Co., which has already been marked in evidence. I do not know that this contract was completed before October 14, 1918.

Q. You have in your correspondence referred to

(Deposition of Clair H. Cotton.)

wax contract as having been made with the defendant, haven't you?

A. A contract form had been submitted but had not been completed in all its details, inasmuch as there were a number of changes which had to be made.

Q. Those changes had not come up at that time, had they?

A. They came up as soon as the typewritten form of the contract was received and we saw how the contract had been drawn.

Q. Yet the contract had been made in the correspondence between Cotton & Company and Bleecker & Company? [41]

A. A form of contract had been submitted by Rutger Bleecker & Co.

Q. You had agreed upon all of the terms of sale and purchase in your correspondence with Rutger Bleecker Company so far as you knew them at that time?

A. I cannot answer that question because that was handled by our New York office. This contract with Mitsui was cancelled later for failure to deliver.

Q. Is that your signature? A. It is not.

Q. C. H. Cotton?

A. My name but not my signature.

Q. Well, I show you what purports to be a letter written by Cotton & Company to the Ozmo Oil Refining Co. and ask you if complainant did not cause that letter to be sent bearing date December 17, 1918.

A. This letter was written by my Secretary and I don't think that I dictated it. Apparently not,

(Deposition of Clair H. Cotton.)

it was dictated by my secretary, evidently in my absence.

Q. The Secretary had the authority to write letters, didn't he?

A. She did not have any authority to write letters binding us to anything.

Q. Do you disclaim responsibility for that letter?

A. I don't recall anything about that letter. The duties of my secretary are that she handles some of the detail work in arranging shipments during my absence. She did it by my authorization. When questions came up that she had reason to believe required immediate action, she had authority to take [42] action only with reference to matters of detail of shipping. I do not mean with reference to those things satisfactory and not unsatisfactory to the company. I mean what I testified to.

Defendants' Exhibit "G" was offered in evidence, as follows:

Defendants' Exhibit "G."

Letter-head

COTTON & COMPANY, INC.

Buffalo, N. Y.

December 17th, 1918.

Ozmo Oil Refining Co.,

433 California Street,

San Francisco, Cal.

Gentlemen:

In regard to the November shipment of Wax, there is no particular use in going over the details

of the delay in getting this shipment out. The thing to do now is to figure a way to work it out without hardship to anyone.

We infer from your correspondence that it will probably be difficult for you to get the November lot out and at the same time keep up shipments on the other lots. We therefore suggest the following plan.

Our contract of sale on the six hundred (600) tons for next year, gives us the privilege we believe of shipping 5% more or less on each months consignment and our plan is to make a little addition to each shipment, working these extra fifty tons off in this way.

In other words, instead of shipping exactly fifty tons in each case, ship 5% more than fifty tons and we can probably arrange to get rid of the whole lot in this way.

We are asking you to co-operate with us in this matter without prejudice to our claim that the delay in shipping and notification of your inability to ship relieves us of our responsibility to take the goods.

In other words, we do not want to work any hardships to your good selves or to our own interests, but want to find a way to co-operate that will get rid of the merchandise. We think that you will agree with us that this is a fair and equitable way for all concerned.

Please keep us posted well in advance of the situation at your refinery so that we will be in a position to meet any other emergency that may come up.

Mitsui & Company were a little technical in this matter, but we do not believe our other customer will be. [43]

The decline in the price of Match Wax was undoubtedly Mitsui's reason for taking the position they did.

You will find it is always our intention to work with you very closely and we are confident that we can do a lot of business with you on Paraffine Wax and also on lubricating oils.

In connection with this last item we would like to have samples of your principal stocks as there is usually a good market in the East for these products. We would also like to know what position you are in to ship in barrels, as well as in tank cars and if you have your own tanks, and if not whether you will have any difficulty in obtaining tanks for Eastern shipments.

Wishing you the compliments of the season, we are

Very truly yours,

COTTON & COMPANY, INC.

C. H. COTTON,

S.

President.

United States

License

No.

G-08752

Food Administration.

FMS/F.

I do not recall the date when the Mitsui contract

(Deposition of Clair H. Cotton.)

was cancelled. That contract was handled entirely by our New York office so far as I recall. I have no direct first hand handling of that transaction. I haven't any first hand knowledge of that transaction. I believe the Mitsui contract was signed by our Mr. Leon. I do not know who signed it for the Mitsui Company, and I do not know when it was signed. I could not give you the date when it was cancelled. I know it was reported cancelled from our New York office and that no shipments were made on it. I know Mr. Leon's signature. The letter dated October 15, 1918, which you show me is signed by Mr. Leon.

Q. You know what Mr. Leon had in mind when he said that one of the parties to whom the material was sold seems to have some doubt on the subject and we simply wish definite assurance in this matter before closing with them?

A. As far as I knew the only thing he had in mind was with reference to how the material was to be packed. I do not know [44] to whom he referred by "them." The letter of October 15, 1918, was offered in evidence, and is as follows:

Defendants' Exhibit "H."

Letter-head

COTTON & COMPANY, INC.

New York.

October 15, 1918.

Ozmo Oil Refining Co.,
#433 California St.,

San Francisco, Cal.

Gentlemen:

We are in receipt of your valued favor of October 10th, contents of which have had our careful attention.

We wish to thank you for your clear and comprehensive explanation of the circumstances in connection with our purchase of Matchwax, and wish to say, that if all this information had been in our hands originally, there would have been a saving of much needless correspondence. We, of course, appreciate the fact that you would desire some protection on such a long-term contract, and are perfectly willing to arrange same. In fact, we have, today, received a letter from our Buffalo office, advising us that they had opened a letter of credit with the Buffalo Trust Company, in your favor, and in accordance with the terms of your contract.

We were rather surprised that you paid no attention to our wire regarding packing, and while we were quite confident that double head barrels referred to the packing you mentioned, one of the parties to whom the material was sold, seemed to have some doubt on the subject, and we simply

(Deposition of Clair H. Cotton.)

wished definite assurance in this regard before closing with them.

However, all this uncertainty has now been cleared up to our satisfaction, and we trust there will be no further difficulty with regard to the matter.

We are always interested in Paraffine Wax, in all grades and melting points, and trust that you will communicate with us promptly, should you have any further quantities to offer, for any shipment.

We appreciate fully, the spirit in which your letter was written, and awaiting your further favors, we are

Yours, for the Fourth Liberty Loan,
COTTON & COMPANY, INC.

A. P. LEON,

Sales Manager.

United States

License

No

G-08752

Food Administration

APL. BS. [45]

Redirect Examination.

In my testimony with reference to the contract and modification or changes, I do not want to be understood as passing on the legal effect of the transaction. I have no personal knowledge of this contract with the Osmo Company except what I got from the correspondence and the contract itself, only what I did in Buffalo by way of establishing letter of credit. I first received any document

(Deposition of Clair H. Cotton.)

in the form of a contract bearing the signature of the Osmo Oil Refining Co. about October 14, 1918. As I understand it, the entire transaction is covered by this correspondence passing between Cotton & Company and Rutger Bleecker & Co. and the Ozmo Oil Refining Co. That's as I understand it so far as the contract of purchase itself is concerned.

The deposition of A. PERCY LEON was taken on behalf of plaintiff by stipulation, all objections being reserved, and is as follows:

Deposition of A. Percy Leon, for Plaintiff.

My name is A. Percy Leon; I reside at No. 204 Hamilton Avenue, New Rochelle, New York. My business address is 35 South William Street, New York City. I have been in business for myself for about two years. I was with Cotton & Company, plaintiff herein, as their Sales Manager before I went into business for myself. I was in the employ of Cotton & Company in the year 1918. I had charge of a transaction relating to the purchase by Cotton & Company from Ozmo Oil Refining Co. of 700 tons of (105, to 108 Melting Point) white, semi-refined wax, similar to samples that were or were to be submitted, which wax [46] was to be packed in double-headed barrels. I had charge of that purchase for Cotton & Company. It was made through Rutger Bleecker & Co., brokerage firm at 87-89 Wall Street, New York City.

Q. Did they represent and act for Ozmo Oil Refining Co.?

(Deposition of A. Percy Leon.)

A. No more than any other principal for whom they might be offering or purchasing a commodity.

Rutger Bleecker offered the wax to Cotton & Company. Mr. Rader of Rutger Bleecker & Co. called me up. I cannot remember his exact words, but he offered 700 tons of wax at a price, and we made them a bid somewhat lower than their offer and they accepted the bid. None of the wax was delivered up to the time I left Cotton & Company, which was early in March, 1919. The negotiations for the purchase of this was extended over a few weeks time. The contract for the purchase and sale of this wax was put in writing. I had to do with this agreement. The agreement as first submitted was not satisfactory to either party and another written agreement was made and the latter one had to be further modified. The first modifications as I remember them related to the fact that Osmo Oil Refining Co. demanded a letter of credit and Cotton & Company demanded that the quantities be specific. After the first contract was submitted Ozmo requested that a new contract be drawn up satisfying a letter of credit to be established in San Francisco. The original contract specified deliveries of from 500 to 700 tons of the wax over the contract period with deliveries of from 35 to 50 tons per month, and Cotton & Company insisted that it be specific and struck out the 500 and 35 and made it 700 tons over the contract period with deliveries of 50 tons per month as the goods had been sold.

Q. During these negotiations I told Rutger

(Deposition of A. Percy Leon.)

Bleecker & Co. through their Mr. Rader, before the original contract was signed [47] that we had resold this wax. I cannot fix the date when I gave them notice. I simply know it was before any contract was signed. I cannot remember whether I told him to whom we had resold the wax or not. To the best of my knowledge, Cotton & Company never paid anything to Rutger Bleecker & Company as commission or compensation for their services in connection with this transaction. They were not supposed to as it was not the custom in the business.

Cross-examination.

I am sales manager with Cotton and Company. I have not been with them since March, 1919, so that if a payment or delivery had been made under this contract I would not know, except through meeting Mr. Cotton, who has advised me that no delivery has been made. Otherwise than that I do not know of my personal knowledge Rutger Bleecker & Co., as I recall it, called us first and made us the offer that they had received from their principals. Cotton and Company had done business with Rutger Bleecker & Co. to some extent before that, for some time. I recognized Mr. Rader's voice over the telephone as I knew him very well. I do not exactly recall whether Mr. Rader mentioned any special person or company from whom he expected to procure the wax. Mr. Rader and I had been on rather confidential terms and frequently he would name his principals before I had either accepted or rejected his offer, but I do not recall whether he did so in this instance

(Deposition of A. Percy Leon.)

or not. I do not remember the first date that I discovered that the wax was to be gotten from the Ozmo Oil Refining Co., but it was within a day or so after the original offer. There was an agreement drawn up in writing and which was submitted to us and modified by Ozmo before we had signed it, and was also rejected by us. It was not subsequently signed by us. The original was returned to them rewritten and a new contract submitted. [48]

Q. Then Mr. Leon, it is your understanding that there was never but one written contract entered into between the parties?

A. Well, a contract is not a contract until it is signed, and a contract is not formally signed until all the parties agree to it, and the minds of these two parties had not met until both agreed upon the points of dispute. One written contract was entered into between the parties. I have not a copy of that contract. I do not remember the date when I first notified Mr. Rader that the wax had been resold, except that it was, of course, subsequent to his originally making the offer and our counter bid and prior to the time when the contract was signed. It was sometime along between then.

Q. Cotton & Company would not have resold the wax unless they had a contract which they considered binding, would they?

A. They considered it binding. It happens every day and as the market was practically at the peak at that time, it looked like a mighty good sale.

(Deposition of A. Percy Leon.)

Q. So then it was not on the reliance of this contract?

A. Yes, absolutely, it was on the reliance of this contract. The contract was not signed, but it was upon the assumption that the contract would be signed that the sales were made.

I have no knowledge myself whether Osmo Oil Refining Co. paid a commission to Rutger Bleeker & Co.

Q. Is it the custom of the trade to consider that an accepted offer to sell binds the party making the offer? In other words, does it make a contract?

A. Well that is a difficult question. It does not make a contract—no—but of course it is understood that provided the parties agree on the conditions of payment and no other modifications are brought up later which might necessitate a [49] change in any other way in the original acceptance, then a sale has been consummated.

Q. Well, after, to adopt your phrase, a sale has been consummated, a seller according to the custom of the trade would not be in a position to repudiate it?

A. Certainly, if the buyer made objections to certain clauses in the contract, and so could the buyer if the seller made objections as to certain clauses or demands. For instance, should Cotton have refused to offer a letter of credit as Ozmo demanded, Ozmo might at their option have considered the sale as not binding or have agreed to ship the goods on sight draft terms as originally offered. It is done every

(Deposition of A. Percy Leon.)

day, for after the parties modify the terms they have to agree as to such modifications.

I had several conversations with Mr. Rader before the details of the transaction for the purchase of the wax was completed. Rutger Bleecker & Co. were brokers who had acted for various other sellers in doing business with us. I do not recall exactly the date on which the contract was modified so that it took its final form. The correspondence may refresh my mind, as it is over two years ago. I do not even recall what month it was in. I remember the transaction strung along August, September and I think October. I am not sure about it, but I think it was that period of the year. I do not recall the date when I informed Ozmo that the wax had been resold. I wrote that letter from Cotton & Company to Ozmo Oil Refining Co. dated October 3, 1918, and signed it.

Q. I read this sentence, "As stated in our wires we are perfectly willing to co-operate with you to the extent of a bank guarantee or a letter of credit for our purchase, but do not [50] understand why this should be necessary as the material has all been resold to responsible houses and particularly in view of the fact that no mention of these terms was made in your contract which we signed." Now, Mr. Leon, that letter, dated October 3d, mentions a contract which Cotton & Co. had signed, was that the original contract?

A. No, as this thing is, as I have already said vague, as I recall it now Ozmo forwarded a contract which they themselves had not signed, making no

(Deposition of A. Percy Leon.)

mention of this letter of credit, and we made minor corrections with reference to the quantity, as I stated before, eliminating the vagueness of the quantity mentioned, and then returned it to them and then received their demand for a letter of credit. When I said the contract had not been signed, I meant they had not signed the contract. Not Cotton & Co. Cotton & Co. did sign that original agreement which was not signed by Ozmo. This original agreement must have been signed by Cotton & Co. previous to October 3, 1918. However, it was cancelled and abrogated by a final agreement which was signed by both parties which embodied new terms and conditions. Our understanding was, in accordance with the custom and manner in which we do business, that the original agreement was never in force. I know the names of the parties to whom the wax was resold. I sold it. Six hundred tons to the Standard Oil Company and 100 tons to Mitsui & Co. Cotton & Co. had written contracts with both of these parties. I have no copies of these contracts. Mr. More may have. I do not recall the dates of the contracts of these purchases. Our negotiations with the Standard Oil Company were with Mr. Salisbury, but whether he or Mr. Cole signed the contract, I am not sure. As to the Mitsui contract, I do not know. To the best of my recollection I signed the contracts on behalf [51] of Cotton & Company, although Mr. Cotton was in New York and may have signed them, but I think I signed both. I do not know what happened after I left Cotton & Company's employ. My

(Deposition of A. Percy Leon.)

understanding was that both these contracts were cancelled. I do not know the dates when they were cancelled.

Q. Do you know anything about the circumstances under which they were cancelled?

A. I know that no wax was delivered during November and December of the two allotments to Mitsui & Co., and I know that no tenders on the contract were made during January and February. After that I do not know what happened, except from hearsay.

Redirect Examination.

The contracts were decidedly not cancelled by mutual consent. When I say they were cancelled, I understood that the Ozmo had tendered some wax which was not up to the contract value, and it was rejected. I notified Rutger Bleeker & Co. within a few days that I had made a resale to the Standard Oil Company and Mitsui & Co.,—within a very short time. That does not help me to refresh my memory as to how soon after the original offer and bid I notified Rutger Bleeker & Co. that I had resold it, except that I know it was within a few days after the contract was closed. By this I mean after the offer had been made and accepted by Rutger Bleeker & Co., and we had made a counter-bid which they accepted—but this was before any written contract was made. I remember the circumstances concerning the sale, for I telegraphed Mitsui people in San Francisco in about the middle of the week offering them 100 tons, and I think it was the next evening that

(Deposition of A. Percy Leon.)

Mr. Cotton and I were in the Hotel Astor when we met Mr. Salisbury of the Standard Oil Company who asked us if we had any wax for sale. I said "Yes, 600 tons," and I gave him an [52] option on it until the following Saturday. I called at his office on Saturday morning and he accepted the 600 tons and in the meantime we had received a wire from Mitsui & Co. accepting the 100 tons. I know that we told Rutger Bleecker & Co. that the wax had been resold. I told them that before any written contracts were entered into. I cannot recall whether I communicated with the Ozmo people directly or in any other way about the resales prior to the execution of any agreement with them. To the best of my recollection there was some delay in receiving the contracts, and as I remember it, I did call Rutger Bleecker and asked them if there was any way to speed up the contracts as the goods had been resold.

Recross-examination.

The Ozmo Oil Refining Company was not a party to the written contracts that Cotton & Co. had with the Standard Oil Company and Mitsui & Company.

The deposition of BENJAMIN RADER was taken on behalf of plaintiff under stipulation, reserving all objections. It is as follows:

Deposition of Benjamin Rader, for Plaintiff.

I live at 1155 Longfellow Avenue, New York City. I am a broker and have been in that business eight years. I am employed by Rutger Bleecker & Co., and have been with them all the time. I know Mr.

(Deposition of Benjamin Rader.)

Leon. I remember in the summer and fall of 1918 that I had communications with Mr. Leon concerning the purchase and sale of this wax in question. I recollect that we did offer Cotton & Company some 500 or 700 tons of wax in the [53] summer or fall of 1918. Whether we had the seller's name at the time we proposed this offer to Cotton and Company, I do not recall. The offer was made to us through our San Francisco office. I learned that we were making an offer of this wax for the Ozmo Oil Refining Company, one of the defendants in this action. Prior to our offering this wax to Cotton & Company they did not request us to procure wax for them. I believe we did offer this wax to other people. Up to the time that we offered the wax to Cotton & Company we were acting presumably for the Ozmo Oil Refining Co., but I do not recall whether I had the seller's name at the time I had the offer in hand. When I called up Cotton & Company I spoke to Mr. Leon who has just testified. My recollection is that Cotton & Company made a bid, a counter-bid on this wax which I offered to them. I communicated that bid to our San Francisco office who handled the transaction there.

Q. Did Mr. Leon, after that, say anything to you about having resold this wax?

A. It was mentioned casually, about what time I cannot say. I know something about the signing of the written contracts. I do not believe they all went through our office, but I cannot say positively.

Q. Do you know whether they notified you that

(Deposition of Benjamin Rader.)

they had resold this wax before you had any written agreements go through your office?

A. No, I cannot recall that.

Q. Did Mr. Leon at one time call you up early after the negotiations were started and express some concern about wanting these contracts signed as Cotton & Co. had resold the wax?

A. I do not know whether it was for that reason that he [54] wanted the contract, but he did urge us to get it through, as there had been some delay. Very likely he told me at that time that the wax had been resold. He did remark that it had been resold, but when he said it is impossible for me to recall.

Q. When you dealt with Cotton & Co. was it a fact that you knew they were not buying it for themselves? A. No, I did not.

We have been in communication with Cotton & Co. before. As far as I know they are jobbers and importers of oils and waxes. I knew that at that time.

Q. Do jobbers and importers usually use this?

A. It all depends, they might have been manufacturers also.

I did not know them as manufacturers.

Q. You were satisfied they were buying this to resell and not keeping it to use themselves.

A. I do not know that I ever even gave it a thought. It did not interest us.

Cotton & Company never paid Rutger Bleecker & Co. anything for their services. They were not required.

(Deposition of Benjamin Rader.)

Cross-examination.

The house of Rutger Bleecker & Co. dealt in numerous kinds or products. Its course of business was to find someone who wanted to sell something and someone who wanted to buy something and arrange a sale and have a commission paid by the seller. Sometimes a person or a company may be the buyer, and sometimes the same person or company may be the seller. The firm of Rutger Bleecker & Co. never assumed the responsibility for the solvency of the buyer or *sell*, or ever in any way guaranteed the [55] performance of the contract as brokers. Rutger Bleecker & Co. in buying and selling wax or other products never represented that they represented one party rather than the other, or that they acted on behalf of one party rather than the other. In this transaction no representation was ever made by Rutger Bleecker & Co. that they held this wax as agents of the Ozmo Oil Refining Co. As far as Rutger Bleecker & Co. were concerned, they did not take any interest in whether the wax had been resold by Cotton & Company or not. They did not care what Cotton & Company expected to do with it.

Mr. Smith, of counsel for the plaintiff, then said:

"We now desire to offer certain correspondence in evidence. The object of this correspondence is to show that this contract was made later than October 11, 1918, although it is dated September 5, 1918. There are two letters, and I think they have been offered in evidence—August 29th and August 31st. They have been read."

The plaintiff then introduced in evidence its exhibits, numbers 1 to 56, inclusive, which are, as follows:

Plaintiff's Exhibit No. 1.

September 17, 1918.

Rutger Bleecker & Co.,
#87 Wall St.,
New York City.

Gentlemen:

We enclose contract in duplicate, covering the purchase, by us, from the Ozmo Refining Company, of 700 tons, 105 to 108 White, semi-refined wax.

We wish to point out that our purchase was for seven hundred (700) tons. We wish this understood in order that we may offer the material for sale without any misunderstanding on the part of our prospective clients. We would also like to have a sample of the wax as soon as possible.

Furthermore, let us point out that you have neglected [56] to state in your contract, the whereabouts of the Ozmo Refining Company. We would like to know this, in order that we may obtain some information regarding the sellers.

Please have the sellers sign and return to us, as soon as possible, one copy of this contract.

Very truly yours,
COTTON & COMPANY, INC.,
Sales Manager.

APL. BS.

Plaintiff's Exhibit No. 2.

Letter-head
RUTGER BLEECKER & CO.
New York.

September 23rd, 1918.

Messrs. Cotton & Co., Inc.
37 Liberty St.,
New York City.

Gentlemen:

Replying to your favor of the 17th. we have changed contract covering your purchase of Paraffine Wax to read 50 tons monthly instead of 35 to 50 tons monthly. As soon as the sellers acceptance comes to hand we will turn the same over to you.

This will also serve to hand you accepted contract of the Arabol Mfg. Co. covering one carload of crude corn oil.

Yours very truly,
RUTGER BLEECKER & COMPANY,
Per B. RADER.

BR/SM.

Plaintiff's Exhibit No. 3.

POSTAL TELEGRAM—TELEGRAM.

Buffalo, N. Y., October 1st, 1918.
Ozmo Oil Refining Company,
San Francisco, Cal.

Arranging with our bank to take up matter of credit with you direct by mail.

COTTON & COMPANY, INC.
Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 4.

POSTAL TELEGRAM—TELEGRAM.

11:23 A. M. October 2, 1918. [57]

Ozmo Oil Refining Co.,

Berkeley, Cal.

No reply our wire thirtieth packing Please wire answer immediately Will arrange credit promptly upon receipt signed contract.

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 5.

WESTERN UNION—TELEGRAM.

B41SF ASC 13

San Francisco Calif Oct 3 1918 1104 AM
Cotten and Co

New York N Y

Packing of wax is as offered to Rutger Bleecker in double head barrels

OZMO OIL REFINING CO.

215 PM.

Plaintiff's Exhibit No. 6.

October 3, 1918.

Ozmo Oil Refining Co.,

San Francisco, Cal.

Gentlemen:

We wired you on the 30th ult., as per copy attached, and having received no reply up to yesterday, we again wired you, requesting that you give us an immediate answer.

We are at a loss to understand why you have paid no attention to our telegram and trust that there is some satisfactory explanation, back of your negligence in this matter. As stated in our wires, we are perfectly willing to co-operate with you to the extent of a bank guarantee or a letter of credit for the amount of our purchase but do not understand why this should be necessary as the material has all been resold, to responsible houses and particularly in view of the fact that no mention of these terms was made in your contract which we signed.

However, as stated above, we shall open a letter of credit in your favor promptly upon receipt of your signed contract which you, of course, understand is necessary for us to have before making this arrangement with our bank. In return for this, it is surely not too much for us to ask that you post a guarantee for the performance of the contract in order that we may be secured.

Rutger Bleeker & Co., informed us that you could refer us to the Canadian Bank of Commerce but upon applying to these [58] people, they stated that they had no knowledge of you whatsoever.

Trusting that this affair will soon be cleared up to our mutual advantage, we are,

Yours, for the Fourth Liberty Loan,
COTTON & COMPANY, INC.,
Sales Manager.

APL. BS.

Plaintiff's Exhibit No. 7.

POSTAL TELEGRAPH—TELEGRAM.

October 8, 1918.

Ozmo Oil Refining Co.,
San Francisco, Cal.

Referring your wire Rutger Bleecker have arranged letter credit covering wax purchase which will be opened immediately upon receipt your signed contract These papers necessary complete arrangements with bank.

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 8.

October 8, 1918.

Ozmo Oil Refining Co.,
San Francisco, Cal.

Gentlemen:

We are enclosing herewith a letter covering six hundred (600) tons of Wax, purchased from you, and which has been resold to the Standard Oil Company of New York.

The one hundred (100) tons for shipment, fifty (50) tons monthly, November/December, 1918, has been resold to Messrs. Mitsui & Co., Ltd., of San Francisco.

Please note to mark this one hundred (100) tons as follows:



KOBE

#1 and up.

notifying us in advance by wire when shipment will

be ready to go forward, in order that our buyers may apply for freight permit, and issue instructions.

In accordance with your request, we have arranged with our bank to open a letter of credit, in your favor, covering the entire amount of this contract, which will be done as soon as [59] your signed contract has been received by us. We shall be very glad to have you place before us your further offerings of wax which you may have, and we trust that our instructions, with reference to the shipment of this material will have your careful attention.

Awaiting your acknowledgment of these instructions, we are,

Yours, for the Fourth Liberty Loan,
COTTON & COMPANY, INC.,
Sales Manager.

United States

License

No.

G-08752

Food Administration.

APL: F.

Plaintiff's Exhibit No. 9.

October 8, 1918.

Ozmo Oil Refining Co.,
San Francisco, Cal.

Gentlemen :

With reference to our Purchase Order No. 891, covering the purchase of Matchwax from you, beg to advise that six hundred (600) tons of this material, to be shipped fifty (50) tons monthly, January to De-

cember, 1919, both months inclusive, has been resold to the Standard Oil Company of New York, who will furnish you with shipping instructions through their San Francisco representatives, The Standard Oil Company of California.

Please notify Mr. S. G. Casad, care of the Standard Oil Company of California, Standard Oil Bldg., San Francisco, when the January shipment is ready to go forward and also when each subsequent shipment is ready, in order that he may secure the freight permit, etc. Also please note to send a representatives sample of each shipment to Mr. Casad in order that same may be tested for melting point and oil and moisture content.

We have been advised by our brokers, that "tight double head barrels" means *oil barrels* and it is our understanding that the material will be supplied in this packing. Please note further when making these shipments to supply Mr. Casad in San Francisco with three (3) sets of weight sheets for each shipment and also to forward five (5) copies of the weight sheets to us, attached to railroad bill of lading and draft. We would appreciate it if you could arrange to make shipments earlier, and in larger quantities than specified in the contract, as the buyers are very anxious to secure some of this material.

. . Trusting that there will be no difficulty with reference to these matters, and awaiting your acknowl-

edgment of these instructions, we are,

Yours, for the Fourth Liberty Loan,
COTTON & COMPANY, INC.

United States

License

No.

G-08752

Food Administration. [60]

Plaintiff's Exhibit No. 10.

Letter-head

RUTGER BLEECKER & CO.

New York.

October 8th, 1918.

Messrs. Cotton & Co.

37 Liberty St.

New York City.

Gentlemen:

We have a telegram from our San Francisco office dated October 5th, reading as follows.

"Have Ozmos signed contract mailing for signature they say tight barrels mean oil barrels."

Yours very truly,

RUTGER BLEECKER & COMPANY.

BR/SM.

Per B. RADER.

Plaintiff's Exhibit No. 11.

October 9, 1918.

Rutger Bleecker & Co.,

#87 Wall St.,

New York City.

Gentlemen:

We have yours of the 8th inst., contents of which have had our attention.

We thank you for placing this information before us, and remain,

Yours for the Fourth Liberty Loan,

COTTON & COMPANY, INC.,

Sales Manager.

APL.BS.

Plaintiff's Exhibit No. 12.

Letter-head

OZMO OIL REFINING CO.

San Francisco

October 10, 1918.

Cotton & Company, Inc.,

37 Liberty Street,

New York, N. Y. [61]

Attention Mr. A. P. Leon, Sales Manager.

Dear Sir:

We have received your letter of October 3, for which please accept our thanks.

In reply to same, permit us to state that there is no satisfactory explanation which we can make you, owing to the fact that there has been no negligence on our part in this matter. Beginning with this transaction, permit us to state that, in the ordinary course of business, we offered to Rutger Bleecker & Company, San Francisco

"Subject unsold 50 tons monthly for November, December, and the year 1919, 105 to 108 melting point White Semi-refined Wax packed in double head barrels."

It is reasonable to suppose that they, in turn, offered you this wax as above. Further, we had

a telegram from Rutger Bleecker & Company, New York, stating that your dear selves were the purchasers of the wax in question. Upon receipt of such information, we forwarded original contracts to Rutger Bleecker & Company for signature. These contracts came back, and, upon arriving in San Francisco, it was discovered that a clause, such as is ordinarily put in all of our contracts, was missing. The clause in question reads as follows: "Irrevocable credit to be established in our favor and subject to our demand every 30 days as wax is being shipped." You will understand please that we, as owners of the wax in question, reserve the right to sell our merchandise in such a manner that would assure us absolute protection against loss of any kind, and we, in turn, will stand ready to protect you, or any other purchaser of our merchandise to the fullest extent. Therefore, we drew up new contracts with the clause inserted as above-mentioned, and have given them to Rutger Bleecker & Company to be forwarded to you for signature. It is not our desire to hinder you in any way, being that we stand ready at all times to co-operate with you in every way and manner possible.

The wax in question, as offered to Rutger Bleecker & Company, is packed in double-head barrels, which to the wax trade, means oil or glucose barrels with six or eight iron hoops. For your own information, we beg to state that we put double heads in all of our wax barrels as a protection against moisture. As to the material these barrels are made of, we can give you no definite informa-

tion. Some barrels will be fir; some, oak; and some, soft wood. Barrels are difficult to procure at the present time; nevertheless, you will receive as good a barrel from us as wax was ever shipped in by any other company.

Our reference and bank is the Canadian Bank of Commerce, located in San Francisco, California, and not in New York as you have been led to believe.

We wish to thank you for your kindness, and hope that we have cleared up any and all points which have not been clear [62] to you. It is our aim to co-operate with you, and we trust that this transaction will only be the beginning of pleasant relations with your firm, and that in the future we will be able to receive your valued business to our mutual advantage.

Yours for winning the war,
OZMO OIL REFINING COMPANY.

By N. R. WEST,
NRW-C. Sales Manager.

Plaintiff's Exhibit No. 13.

WESTERN UNION—TELEGRAM.

Buffalo, N. Y., October 11th, 1918.
DAY LETTER.

Ozmo Oil Refining Company,
San Francisco, Cal.

We have been trying for several days to get advice from you as to where signed contracts are as these documents necessary in completing letter of credit Arrangements all made for this credit

and we are waiting receipt of documents Have authorized you insert letter of credit terms on contract Please advise by wire when documents were mailed and whether to New York or Buffalo Answer Buffalo

COTTON & COMPANY, INC.
Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 14.

October 11, 1918.

Rutger Bleecker & Co.,
#79 Wall St.,
New York City.

Dear Sir:

Attention Mr. Rader.

We beg to acknowledge receipt of contract, in duplicate, covering our purchase, through you from the Ozmo Oil Refining Co., of San Francisco, Cal., of:—

700 tons, Matchwax.

We are returning herewith, duly accepted copy of this contract, which we have corrected, as you will note. Inasmuch as our correspondence, relative to this transaction, was in reference to 700 tons, and as our resales have been based on this quantity, [63] we feel that we are entitled to delivery, in full.

We have also added the clause "oil barrels, suitable for Export," in accordance with your telegraphic confirmation.

Trusting that there will be no further hitch in regard to this matter, and assuring you that letter

of credit will be opened immediately, upon receipt of this contract, by our Buffalo Office, we are,

Yours, for the Fourth Liberty Loan,

COTTON & COMPANY, INC.,

APL.BS.

Sales Manager.

Plaintiff's Exhibit No. 15.

WESTERN UNION—TELEGRAM.

1918 Oct 11 PM 3 55

B176CH 10

San Francisco Calif 1217 P 11

Cotton and Co

Buffalo N Y

Wax contracts delivered to Rutger Bleecker Co.
five days ago.

OZMO OIL REFINING CO.

Plaintiff's Exhibit No. 16.

October 12, 1918.

Ozmo Oil Refining Co.,
San Francisco, Cal.

Gentlemen:

We enclose confirmation of lay letter sent you
yesterday, as follows:

“We have been trying for several days to get
advice from you as to where signed contracts
are as these documents necessary in completing
letter of credit arrangements all made for
this credit and we are awaiting receipt of
documents have authorized you insert letter of
credit terms on contract please advise us by
wire when documents were mailed and whether
to New York or Buffalo answer Buffalo”

to which we received your reply as follows: [64]

"Wax contracts to Rutger Bleeker Co five days ago."

However, we have since received the contract from these people, and the matter will now have our attention.

Thanking you, we are

Very truly yours,
COTTON & COMPANY, INC.

MBF/O.

Per _____

Encls.

Plaintiff's Exhibit No. 17.

**POSTAL TELEGRAPH—TELEGRAM.
NIGHT LETTER.**

New York, N. Y. Nov. 19, 1918.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Ship fifty tons matchwax our contract to order Cotton and Company Inc Notify Mitsui and Company Ltd San Francisco under domestic b lading drawing on us through Buffalo Trust Company If possible arrange hold cars your switch in order avoid demurage Essential shipment move this month Please acknowledge.

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 18.

WESTERN UNION—TELEGRAM.

1918 Nov 21 PM 2 03

C347 KS 15

San Francisco Calif 1035A 21

Cotton & Co Inc

New York N Y

Your telegram November nineteenth received
Will comply with your instructions Will notify
you of shipment.

OZMO OIL REFINING CO. [65]

Plaintiff's Exhibit No. 19.

November 22, 1918.

Ozmo Oil Refining Company,

433 California St.

San Francisco, Cal.

Gentlemen:

We are in receipt of your wire of yesterday, as follows:

"Your telegram nineteenth received Will
comply with your instructions Will notify you
of shipment."

and beg to thank you for your prompt acknowledg-
ment of our telegraphic instructions, with ref-
erence to the shipment of our November allotment
of Wax.

Trusting there will be no hitch in handling this material, we are

Yours very truly,
COTTON & COMPANY, INC.,
Sales Manager.

APL-EV.

Plaintiff's Exhibit No. 20.

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., November 29th, 1918.
Ozmo Oil Refining Company,

433 California St.

San Francisco, Cal.

Be sure get documents on Match Wax started promptly Must have November bill lading attached draft Wire if documents gone forward

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 21.

November 29th, 1918.

Ozmo Oil Refining Co.,
San Francisco, Cal.

Gentlemen:

We wired you to-day as per copy of telegram attached, [66] asking that you be sure and get the Match Wax started promptly and furnish us a November bill of lading on same.

We trust that this matter has already had your

attention, as our customer is getting somewhat anxious.

Very truly yours
COTTON & COMPANY, INC.,
Secretary.

FMS/F.

Encls.

Plaintiff's Exhibit No. 22.

WESTERN UNION—TELEGRAM.

B140SFAHJ 60 Blue

San Fran Cal 245 P Nov 30 18

Cotton and Co

39 Liberty St

New York

Our refinery advises that it will be physical impossibility to ship wax to you this month Stop Will ship last of December amount due you that month but can't ship November order before early months next year Stop This due to condition beyond our control caused by troubles common to and arising from war influenza Stop We are indeed sorry.

OZMO OIL REFINING CO.

412 P.

Plaintiff's Exhibit No. 23.

POSTAL TELEGRAPH—TELEGRAM.

NIGHT LETTER.

Dec. 2, 1918.

Ozmo Oil Refining Company,

433 California St.

San Francisco, Cal.

Replies Day Letter your notification delay No-

vember shipment did not reach us until this morning Consider this failure notify us earlier inexcusable Our buyers threaten take action against us Stop On what basis will you settle in order enable avoid loss Stop Your telegram twenty-first acknowledging receipt definite shipping instructions and stating specifically your intention to comply with same regarded inexplicable Answer.

COTTON & COMPANY, INC.

Charge. [67]

Plaintiff's Exhibit No. 24.

POSTAL TELEGRAPH—TELEGRAM.

New York, N. Y. Dec. 5, 1918.

NIGHT LETTER.

Ozmo Oil Refining Co.,
433 California St.
San Francisco, Cal.

No reply wire second Unless we receive satisfactory answer within forty-eight hours must proceed against you to recover our loss

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 25.

WESTERN UNION—TELEGRAM.

1918 Dec 7 PM 5 50

416 KS 49

San Francisco Calif 138 P 7

Cotton and Co

39 Liberty St

New York N Y

Your telegram fifth received referring to Novem-

ber war shipment beg to advise that we are advised shipment will be made from the refinery on or before December twenty-third Delay in making this shipment being due to strike at refinery influenza and government regulations as to crude oil supplies.

OZMO OIL RFG CO.

Plaintiff's Exhibit No. 26.

December 7th, 1918.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Gentlemen:

We wire you on the 2nd instant, in reply to your night letter of the 30th ultimo, as per copy attached. Having heard nothing from you, up to the 5th instant, we again wired you, as per second copy attached.

We are certainly surprised at the attitude you are taking [68] with regard to this matter, and feel that you should have notified us, in advance of your inability to ship during the Month of November, in order that we might have had an opportunity to cover our requirements elsewhere.

Our clients absolutely refuse to listen to any such excuses as you give, and we are therefore forced to sustain a heavy loss.

Trusting that we shall hear from you promptly, with a satisfactory explanation of the occurrence,

and an offer to adjust the matter, on a reasonable basis, we are

Yours very truly,
COTTON & COMPANY, INC.,
Sales Manager.

APL-EV.

Plaintiff's Exhibit No. 27.

December 9th, 1918.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Gentlemen:

We beg to acknowledge receipt of your wire of Saturday as follows:

"Your telegram fifth received referring to November wax shipment beg to advise that we are advised shipment will be made from the refinery on or before December twenty-third delay in making this shipment being due to strike at refinery Influenza and government regulations as to crude oil supplies."

We immediately wired you to-day, as per copy attached, and must confirm same to the effect that your explanation of the delay of the November shipment, certainly does not excuse your failure to notify us of said delay prior to the expiration of the month, and that we must therefore hold you responsible for our loss.

We have instructed our Buffalo office to bill you for the amount of the loss, and trust that we may receive a check for the amount in question, promptly, upon your receipt of our invoice.

While we regret being compellel to take this firm stand in the matter, we feel that it is entirely your fault, as you should have notified us prior to the expiration of the month, and we could undoubtedly have come to some arrangement with our [69] buyers, or in the event of our failure to do so, we could have covered in the market elsewhere.

We also confirm our instructions to you to ship the December allotment, to the order of Cotton & Co., Inc., notify Messrs. Mitsui & Co., Ltd., San Francisco, Cal., shipping on a domestic bill of lading, and showing Cotton & Co. as shippers.

Please acknowledge receipt of these instructions, see to it that shipment is made before the expiration of this month, notifying us promptly, when you make shipment.

Trusting that there will be no difficulty regarding any of the other shipments on this contract, and awaiting your further favors, we are

Yours very truly,
COTTON & COMPANY, INC.,
Sales Manager.

APL-EV.

Plaintiff's Exhibit No. 28.

POSTAL TELEGRAPH—TELEGRAM.

DAY LETTER.

New York, N. Y. Dec. 9, 1918.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Your explanation delay November shipment wax

does not excuse failure to notify us prior to expiration of month Must hold you responsible our loss Stop Ship December allotment domestic bill lading order Cotton Company Notify Mitsui and Company San Francisco Please acknowledge.

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 29.

WESTERN UNION—TELEGRAM.

C378KS 17

1918 Dec 9 PM 5 52

San Francisco Calif 233 P 9

Cotton and Co

New York N Y

Acknowledging your telegram December ninth pertaining December wax kindly give us shipping instructions for November wax Answer kindly give us shipping instructions for November wax Answer

OZMO OIL REFG CO. [70]

Plaintiff's Exhibit No. 39.

POSTAL TELEGRAPH—TELEGRAM.

NIGHT LETTER.

Dec. 11, 1918.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Your telegram ninth November wax matter has been referred our Mr Cotton who is now at Buffalo office and will communicate with you direct from

there Stop Imperative December allotment be shipped promptly.

COTTON & COMPANY, INC.

Charge Cotton.

Plaintiff's Exhibit No. 31.

December 11th, 1918.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Gentlemen:

We beg to acknowledge receipt of your wire of the 9th instant, as follows:

"Acknowledging your telegram December ninth pertaining December wax Kindly give us shipping instructions for November wax answer."

to which we replied to-day as per copy attached.

From this, you will understand that we have referred this matter to our Mr. Cotton, who is now at our Buffalo office, and who will communicate with you direct from there.

We feel that your explanation for the delay is quite inexcusable, and furthermore, your failure to notify us of your inability to ship, renders you absolutely responsible for any loss which we may sustain.

Tusting that you will comply with our instructions with reference to the December allotment, and impressing upon you the necessity of making this

shipment during the current month, we are

Yours very truly,

COTTON & COMPANY, INC.,

Sales Manager.

APL-EV. [71]

Plaintiff's Exhibit No. 32.

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., December 17th, 1918.

NIGHT LETTER.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Arrange to ship Mitsui December Match Wax promptly advising us by wire about when same will go forward Follow instructions given for November shipment in regard to holding cars on your switch as long as possible after documents are mailed to Buffalo Writing you in detail regarding November consignment Delay in shipping November lot will require your co-operation to work out Letter explains.

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 33.

December 19th, 1918.

Ozmo Oil Refining Co.,

433 California St.

San Francisco, Cal.

Gentlemen:

With reference to January, 1919, allotment Wax,
please arrange to have the barrels marked

Ⓐ 1/up

also the clause "goods manufactured in the U. S.
A." must appear on all packages. Kindly send all
records through in duplicate.

Our New York office wrote you on October 8th
with reference to the manner in which we desired
these shipments to be made and we trust that you
will comply with such instructions.

We are hoping to hear from you that our De-
cember consignment has been shipped and the
papers forwarded to Buffalo.

Very truly yours,
COTTON & COMPANY, INC.,
Secretary.

FMS/F. [72]

Plaintiff's Exhibit No. 34.

WESTERN UNION—TELEGRAM.

B 193CH 21

1918 Dec 19 PM 2 52

San Francisco Calif 1057 A 19

Cotton and Co

Marine Natl Bank Bldg

Buffalo N Y

Your wire seventeenth wax will leave Refinery about December twenty-eight January Shipment will be made between January twentieth and thirtieth.

OZMO OIL REF CO.

Plaintiff's Exhibit No. 35.

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., December 28th, 1918.

Ozmo Oil Refining Company,

433 California St.

San Francisco, Cal.

Be sure to have December bill of lading covering December shipment Wire us date draft is sent

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 36.

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., January 6th, 1918.

NIGHT LETTER.

Ozmo Oil Refining Company,

433 California St.

San Francisco, Cal.

Advise by wire when documents covering De-

ember shipment Match Wax on our contract were forwarded Also advise present location of cars

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 37.

WESTERN UNION—TELEGRAM.

[73]

C120CH 73

1919 Jan 7 PM 6 38

San Francisco Calif 240 P 7

Cotton and Co

Marine Natl Bank Bldg

Buffalo NY

December shipment wax not up to specifications
Color dark yellow Stop This particular wax is
being supplied by Utah Refining Company Salt
Lake thru their agent Continental Petroleum Com-
pany San Francisco Stop On account wax not up
to specifications we naturally refused accept deliv-
ery Stop Please consider us as acting in good
faith for your interests and would appreciate your
advising your disposition so that we may protect
your interests as well as our own.

OZMO OIL REFINING CO.

Plaintiff's Exhibit No. 38.

POSTAL TELEGRAPH—TELEGRAM.

NIGHT LETTER.

Buffalo N. Y., January 9, 1919.

Ozmo Oil Refining Company,

433 California Street,

San Francisco, Cal.

Yours seventh suggest you take necessary legal

steps protect your interests Wire status balance of shipments for this year advising actual shipment and possibilities of fulfillment Upon receipt this information we will write you fully our suggestions.

COTTON & COMPANY, Inc.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 39.

WESTERN UNION—TELEGRAM.

A767NY 50 BLUE 1919 Jan 13 PM 11 58
San Francisco Calif 512 P. 13

Cotton and Co.

Marine National Bank Bldg
Buffalo NY

Yours ninth referring to ours seventh Continental Petroleum advise that they can furnish sixty tons wax as per contract and specifications to apply on December order of agreeable to you Furthermore they will endeavor to procure forty tons additional to clean up nineteen eighteen account Stop Wire us your disposition.

OZMO OIL. [74]

Plaintiff's Exhibit No. 40.

WESTERN UNION—TELEGRAM.

All8NY 61 4 EX NL 1919 Jan 14 AM 3 11
San Francisco Calif 13

Cotton and Co.

Marine National Bank Bldg
Buffalo NY

Yours ninth wax nineteenth nineteen to be supplied by the same refiners brought same channels as per

our telegram seventh Stop We have advices from Continental on behalf Utah Refining quote By February fifteenth we will be prepared to ship you the white wax as per contract specifications unquote We are awaiting your suggestion and will act accordingly.

E. SWIFT TRAIN,
Vice-Pres. Ozmo Oil.

Plaintiff's Exhibit No. 41.

WESTERN UNION—TELEGRAM.
T103BU FES 24

San Francisco Calif 1229 PM Jany 16 19
Cotton and Co
M B Buffalo
No reply our wire Jany thirteenth received
Stop Would greatly appreciate your advices in answer our day letter relative to cleaning up nineteen eighteen account

OZMO OIL REFG CO.
407 P.

Plaintiff's Exhibit No. 42.

POSTAL TELEGRAPH—TELEGRAM.

NIGHT LETTER.

Buffalo, N. Y., January 17th, 1919.

Ozmo Oil Refining Company,
433 California Street,
San Francisco, Cal.

Your failure to notify us of your inability to ship November December lots white match wax has put us in position of being unable to force Mitsui to

take late delivery Therefore feel we should look to you for protection as we were unable to buy in open market to cover on account of this delay Accordingly do not see how we can accept shipment either now or at later date to cover that part of contract Stop Regarding January June shipments Standard Oil advise that they will be compelled to cancel any portions of contract unfilled according to specifications or late delivery Therefore feel we should buy January allotment in open market [75] billing you for difference you in turn doing same to your suppliers Anxious to co-operate every way possible as we feel confident we can do much future business with you Advise your disposition Stop Later developments make We think there is bare possibility of forcing delivery on Mitsui in spite of delay and have wired them along these lines with the idea of saving you the trouble of collecting loss from your suppliers This uncertain but doing our best

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 43.

WESTERN UNION—TELEGRAM.

A 619 NY 112 4 EX NL Jan 20 PM 10 25
San Francisco Calif 20

Cotton & Co

Marine National Bank Building
Buffalo NY

Referring your telegram January seventeenth please accept our appreciation of your full and com-

plete advices Stop We are submitting as per your letter dated New York City October eighth samples Standard Oil Co California also samples Curtis and Tompkins chemists accounts January shipment Stop Will notify you by telegraph relative chemists analysis and should this wax be as per specifications we will accept same from Continental to apply on January allotment Stop We are looking forward to your advices relative Mitsuis acceptance delayed deliveries and feel confident you will be successful in making mutual satisfactory arrangements Stop Writer is and will be giving personal attention to completion of this contract.

E. SWIFT TRAIN,
Vice-Prest. Ozmo Oil.

Plaintiff's Exhibit No. 44.

WESTERN UNION—TELEGRAM.

A643CH 64 NL

1919 Jan 22 PM 11 15
San Francisco Calif 22

Cotton and Co

Marine National Bank Bldg
Buffalo NY

Sixty tons wax offered us by Continental to apply January allotment Curtis and Tompkins Complete analysis shows melting point one hundred eight and half color light yellow moisture eight one hundredths per cent Stop Standard Oil California analysis shows melting point one hundred seven six tenths color light yellow Stop We understand Standard California wired Standard New

York for instructions Please advise us your dis-position.

OZMO OIL REFINING CO. [76]

Plaintiff's Exhibit No. 45.

WESTERN UNION—TELEGRAM.

C 463NY 91/74

1919 Jan 30 P M 5 59

San Francisco Calif 1225 P. 30

Cotton and Co

Marine Natl Bank Bldg

Buffalo NY

We are advised that the Utah Oil Refining Company can positively ship before January thirty first thirty tons of white match wax of the specifications covered by our contract and that before February tenth they can ship in additional thirty tons and before February twenty fifth an additional thirty tons of the same material Stop They also advise that commencing March first they can and will make regular monthly shipments of this wax Stop This wax will be moving as per above and as usual we wish to keep you advised

OZMO OIL REFG CO.

Plaintiff's Exhibit No. 46.

POSTAL TELEGRAPH—TELEGRAM.

NIGHT LETTER.

Buffalo, N. Y., January 31st, 1919.

Ozmo Oil Refining Company,

433 California St.,

San Francisco, Cal.

Standard Oil refuse take delivery unless quantity

and specifications according contract Therefore suggest you have suppliers hold first thirty tons until entire fifty tons is ready on February consignment meantime protecting yourselves legally against failure in January delivery Trust February and forward will be delivered according contract Stop Ask Utah mail us pound sample Stop Appreciate your cooperation.

COTTON & COMPANY, INC.

Charge

Plaintiff's Exhibit No. 47.

WESTERN UNION—TELEGRAM.

X122 CH 58

1919 Feb 5 PM 4 14

San Francisco Calif 1048 A T

Cotton & Co

Marine Natl Bank Bldg
Buffalo NY

Referring our telegram January Thirtieth your Wire January Thirty first Utah wax sample has been forwarded. Stop Sample submitted Standard Oil here tests white melting point one hundred eighteen [77] one half oil and moisture two decimal forty seven per cent Stop Utah have thirty tons loaded can furnish balance as per our wire January Thirtieth Your immediate reply necessary.

OZMO OIL REF CO.

Plaintiff's Exhibit No. 48.

WESTERN UNION—TELEGRAM.

B545 NY 38 BLUE 1919 Feb 7 PM 7 39

San Francisco Cal 410 P 7

Cotton and Co

Marine National Bank Bldg

Buffalo NY

Referring our telegram Feby fifth have had no reply Stop Utah Refinery advise through Continental if wax tendered as per our wire January Thirtieth is not accepted immediately they must dispose of same elsewhere wire us straight message.

OZMO OIL REFINING CO.

Plaintiff's Exhibit No. 49.

WESTERN UNION—TELEGRAM.

A340CH 44 NL 1919 Feb 8 PM 3 38

San Francisco Calif 8

Cotton & Co

Marine Natl Bank Bldg

Buffalo NY

Ours eighth Curtis Tompkins analysis wax color white melting point one hundred twenty American method one hundred seventeen foreign method Stop Can you point out advantage to your buyer of superior quality than one hundred five to one hundred eight at same price Answer.

OZMO OIL REF CO.

Plaintiff's Exhibit No. 50.

POSTAL TELEGRAPH—TELEGRAM.

Buffalo, N. Y., February 8th, 1919.

Ozmo Oil Refining Co,
433 California Street,
San Francisco, Cal.

Yours of the seventh. Our buyer will take delivery of fifty tons in February but insist it must be for fifty tons according to terms of contract and specifications must be according contract. If first thirty tons mentioned yours of the fifth is within specifications and additional twenty tons can be gotten forward so that fully fifty [78] tons can be delivered within the contract period our buyer of course will accept Be sure all terms and conditions contract and letter of credit fully complied with.

COTTON & COMPANY, INC.

Charge Cotton & Company, Inc.

Plaintiff's Exhibit No. 51.

February 8, 1919.

Ozmo Oil Refining Company,
433 California Street,
San Francisco, Cal.

Gentlemen:—

We enclose confirmation of our telegram of today, regarding shipment of February portion of our contract for Match Wax. The Standard Oil Company have made it very plain to us that they will take delivery but only in absolute accordance with the terms of the contract.

We trust you will appreciate our endeavor to co-

operate with you in every way and realize that we are only protecting you as well as ourselves against taking any shipment that is not in every way satisfactory to them.

We are very anxious to work with you in every way in this matter as well as on lubricating oils. The samples you sent us have been put into the hands of our salesmen and we expect to pass you some orders for lubricating oils shortly.

We might say right here that we are issuing an export catalogue and if you would like to have us do so we would be glad to put in a photograph of your plant, as one of our sources of supply for lubricating oils and waxes.

We are enclosing herewith our invoice, which explains itself, and beg to advise that we are drawing on you at sight for the amount. The difference represents the average market price of Match Wax of the quality called for by our contract during November, December and January. We had no notice whatever of your inability to deliver December and January portions, and in connection with the November shipment, the notice of your failure to deliver was not received until the 2nd of December, so we think you will agree with us that this was not sufficient notice to allow us to protect ourselves, and we must therefore look to you and your supplier should in turn protect you. We trust you will honor our draft upon presentation, and believe us,

Yours very truly,
COTTON & COMPANY, INC.,
President.

Plaintiff's Exhibit No. 52.

**POSTAL TELEGRAPH—TELEGRAM.
NIGHT LETTER.**

Buffalo, N. Y., February 17th, 1919.

Ozmo Oil Refining Co.,
433 California Street,
San Francisco, Cal.

Yours thirteenth or seventeenth just received
Have Mr. Howard advise our Buffalo office by wire
date he will be in New York We will arrange have
Mr. Cotton meet him at our New York office Glad
to co-operate with him but our contract is with you
and we look to you for protection of our losses.

COTTON & COMPANY, INC.

Charge.

Plaintiff's Exhibit No. 53.

POSTAL TELEGRAPH—TELEGRAM.

Back Date Feb 17 2 pm

San Francisco, Calif Feb 13th 1919

BNY 20 Sx 141 N. L

GX

Cottom and Co

Marine National Bank Bldg.,
Buffalo, N. Y.

Your letter eighth Howard president Utah Oil
Rfg here going into matter thoroughly and advise
that when contract was closed his company obtained
its crude from grass creek Wyo and this crude
produced wax per specifications but that in October
his crude was arbitrarily changed to another

Wyoming crude which required special treatment before satisfactory wax could be made stop that this equipment is now installed and that they are in a position to make delivery according to contract stop that the failure in making shipments was caused by conditions over which the Utah oil had no control and therefore under the damage clause of the contract they claim immunity stop however Mr. Howard is going to New York later part of next week and hopes to be able to see your representative and standard oil people and make some satisfactory arrangements.

OSMO OIL RFG. CO.

Plaintiff's Exhibit No. 54.

Buffalo, N. Y., April 10th, 1919.

Ozmo Oil Refining Co.,
433 California Street,
San Francisco, Cal.

Gentlemen:—

The writer had the pleasure of a visit with Mr. Howard [80] of the Utah Oil Refining Company last month, but as far as I could find out he had no solution to offer in regard to the Match Wax for the balance of the year. It seems that it will be impossible for them to produce a match wax of the quality required in time to be of any use to us on this contract.

He did suggest to me however that you might be willing to cancel the balance of the contract in order to clean the matter up. We feel in this connection however, that we have acted in good faith in the

matter and have opened a letter of credit in your favor which we have been compelled to pay for, as the position that the bank takes is that they have held the money there for our use and are therefore entitled to their compensation, which of course is true.

We feel that in view of the fact that you have never fulfilled any part of the contract that we are entitled to compensation for our loss based on the market price of wax on the dates that you contracted to make delivery. We have invoiced you for part of this, namely the November, December and January lots and are enclosing our invoice for \$1217.50 for the February lot. The March portion on this contract is undelivered, and there is, of course, no evidence that any effort will be made on the part of your suppliers to finish out their contract.

We therefore insist that we are entitled to compensation, in accordance with the invoices previously rendered, and the one enclosed, and shall expect immediate settlement of this account.

Unless settlement is forthcoming to us, we shall be compelled to collect the claim in spite of our desire to avoid any unpleasantness between your good selves and our firm.

You will recall that we were never notified of your inability to deliver, except on one lot, and this notification was not sent until the last day of the month, too late for us to act in any way to protect ourselves.

We feel that we have shown our good faith, and that a settlement on your part is now in order.

Yours very truly,
COTTON & COMPANY, INC.,
President.

CHC/EV.

Plaintiff's Exhibit No. 55.

Letter-head
OZMO OIL REFINING CO.
San Francisco.

April 25, 1919.

Messrs. Cotton & Company,
Marine National Bank Building,
Buffalo, New York. [81]

Gentlemen:

Answering your letter of April 10th. We cannot see our way clear to cancel the balance of the contract. Considering the present wax market, you must realize that we could hardly agree to cancel the contract and pay you any compensation.

We are willing to cancel the whole contract and would like to have your views upon this subject.

Very truly yours,
OZMO OIL REFINING COMPANY.
E. SWIFT TRAIN,

Vice-president.

EST—C

Plaintiff's Exhibit No. 56.

MITSUI & CO., LTD.

CONTRACT MEMORANDUM

San Francisco, Cal. October 1st, 1918.

Cotton and Company,

37 Liberty St.,

New York City, N. Y.

Gentlemen:

With reference to our telegram of September 28th, and yours of September 30, we beg to confirm our purchase from you for one hundred (100) short tons Match Wax, on the following terms and conditions:
Quantity:—One hundred (100) short tons net weight in all.

Quality: —White Match Wax, one hundred five to one hundred eight (105–108) MP.

Shipment:—To be made during November and December 1918, fifty (50) short tons each, shipping instructions will follow later.

Price: —At ten and one half cents ($10\frac{1}{2}$ ¢) in U. S. Currency per pound net weight, f. o. b. San Francisco, California.

Packing: —To be packed in double head barrels suitable for export.

Payment:—Draft to be drawn on sight on us accompanied by the shipping document.

Shipping Mark:—



KOBE [82]

1/

This memorandum is made out in duplicate, so if

the same is found by you correct and satisfactory you will kindly return to us, at your earliest convenience, either copy duly signed and approved by your good-selves.

Very truly,

MITSUI & CO., LTD.,

(Signed) Y. NAGASHIMA,

Manager.

Approved and Accepted:

For COTTON & COMPANY, INC.,

(Signed) _____

It was stipulated that the letter marked "Plaintiff's Exhibit 6" and dated October 3, 1918, was received by the Ozmo Oil Refining Co. on October 14th, and that Plaintiff's Exhibit 8, being a letter dated October 8, 1918, was received by the Ozmo Oil Refining Co. on October 14. It was also stipulated that the contract between Messrs. Cotton & Company and Mitsui & Company was executed and delivered on or about October 7th, and that it further appeared that there was some telegraphic offer and acceptance between those two parties prior to that date, to wit, on September 28th and September 30th.

The defendant then introduced in evidence its Exhibits "H," "I," "J," and "K." They are as follows:

Defendant's Exhibit "H."

August 21, 1918.

Messrs. Bleecker, Rutger & Co.,
24 California Street,
San Francisco, Calif.

Gentlemen:

We offer, subject unsold, 50 tons monthly for delivery [83] November, December and year 1919, 105 to 108 melting point, yellow crude scale wax at 9¢ per pound, San Francisco; 105 to 108 white semi-refined wax at 9½¢, San Francisco. The above all packed in double head barrels.

We also offer, subject unsold, September, October, November, and December deliveries, 50 tons monthly, 124 to 126 melting point, white semi-refined wax at 11½¢ per pound wooden barrels f. o. b. San Francisco, in car lots. If interested in the above, advise quickly.

Yours very truly,
OZMO OIL REFINING COMPANY.

NRW—C

By _____,

Sales Manager

Defendant's Exhibit "I."

WESTERN UNION—TELEGRAM.

B129SF ZN 6

RS New York NY 507P Aug 29 1918
Rutger Bleecker and Co.

San Francisco Calif
Buyer Wax Cotton and Co Buffalo

RUTGER BLEECKER CO.
312P.

Defendant's Exhibit "J."

Letter-head

RUTGER BLEECKER & CO.

San Francisco

August 31st, 1918

Ozmo Oil Refining Co.,

433-California Street,

San Francisco, Calif.

Gentlemen:

This will serve as a confirmation of the sale made for your account to Messrs. Cotton & Co., Buffalo, New York, covering the following Wax:

700-tons White Semi-Refined Wax 105 to 108 melting point, tight barrels at 9- $\frac{1}{4}$ ¢ f. o. b. San Francisco. [84]

Shipment to be made 50-tons monthly for November December, and the year 1919—Brokerage to us 1%.

We are now awaiting your contracts, which we will immediately forward to the buyers for their signature, which we will return for your files.

Yours very truly,
RUTGER BLEECKER & CO.,
By HARVEY L. LAUGHLIN.

L -JW.

Defendant's Exhibit "K."

MEMORANDUM.

COTTON & COMPANY vs. OZMO OIL REFINING COMPANY.

The market price of white semi-refined wax, 105 to 108 melting point, f. o. b. San Francisco, was as follows:

1918.

October	8½—9
November	8½—9
December	8½—9

1919.

January	8½—9
February	8½—9
March	8½—9
April	7½—8
May	5 —5½
June	5 —5¼
July	4½—5
August	4½—5
September	4¾—5
October	5 —5½
November	5½—6
December	5½—6 [85]

It was stipulated that Defendant's Exhibit K was a correct schedule of the market price of white semi-refined wax 105 to 108 melting point, f. o. b. San Francisco.

The case was then closed, and after argument the Court said:

The COURT.—I am satisfied in this case that the contract, as counted upon, was finally executed as of the date that is alleged, and that the evidence brings this case fairly within the rule of the special damages counted upon. Of course, the rule is not uniform in its application, as counsel has shown; some courts rule with a greater strictness and others with greater leniency; but the rule in this country, I think is rather more liberal than the English rule, and, in fact, I think the modern rule is more liberal than as stated by Sutherland. If it is fairly brought to the attention of the seller, the party contracting to sell, that the goods contracted for have been resold, or the circumstances are such as to advertise to him, as is shown in a number of these cases, without special notice, that that, necessarily, is the purpose of the purchase, he is liable for the damages that the party has suffered by reason of the circumstances growing out of the transaction—and that is the value that the party would have received or the price that the party would have received upon the resale.

As far as the other point is concerned, I really do not think there is anything of substance in it. The evidence of Leon is sufficient in itself. While somewhat vague as to the exact date, it is sufficient in itself to show that the defendant, here, had notice a very considerable time before the contract was finally executed that the goods had already been resold. [86] It was not material that he should have been able or should have stated to them at that time the precise date on which they had been resold, or that he should have been able to put the finger of his mind

upon it when he was testifying. He did fix it very definitely as subsequent to the time the broker's proposition was accepted, but some time before the final execution of the contract.

As to the first point, I have sufficiently indicated my view on that, that the contract did not become a contract under the very contemplation of the parties until it was finally put in such form as that the minds of the parties met upon it, and that that was evidenced by their respective signatures.

Would counsel on either side like to have findings? We do not give findings in this court unless they are demanded really before judgment, but I very rarely refuse them on that ground.

Mr. LANAGAN.—I would like to have findings.

The COURT.—Very well. You may draft findings, Mr. Smith, and submit them to Mr. Lanagan, and if you have any amendments you wish to submit, Mr. Lanagan, you may do so; if you cannot agree on them I will settle them.

Judgment, then, may be entered upon the findings. As I gather it, there is no particular question between you as to what the amount of the recovery will be, under the rule I have indicated, the difference between the contract with the defendant and the price for which the goods were to be resold to the Standard Oil Company and to Mitsui & Co.

The Court then made and filed its decision embracing [87] findings of facts and conclusions of law, in words and figures following, to wit:

(Title of Court and Cause.)

Decision Embracing Findings of Fact and Conclusions of Law.

This case coming on regularly for trial on the 4th day of May, 1921, before this court sitting without a jury, a jury having been expressly waived by written stipulation filed herein, Willard P. Smith, Esq., and Walton C. Webb, Esq., appearing as attorneys for Cotton and Company, Inc., the plaintiff, and James Lanagan appearing as counsel and Thomas Beedy and Lanagan, as attorneys for the defendants, Ozmo Oil Refining Company and Petroleum Products Company, and evidence oral and documentary having been offered upon each and all of the allegations and issued in said action, and the same cause having been thereupon submitted to the Court for its consideration and decision and the Court having fully considered all the matters both of law and fact submitted to it, and being fully advised in the premises, now makes and renders its decision herein embracing its findings of fact and conclusions of law as follows, to wit:

FINDINGS OF FACT.

The Court finds as follows:

I.

That plaintiff now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business at the City and County and State of New York, and that it was

by virtue of its incorporation a citizen of the State of New York. [88]

II.

That the defendant, Ozmo Oil Refining Company, was at all times herein mentioned and is now a corporation duly organized and existing under and by virtue of the laws of the State of California and that it was and is a citizen of the said State of California, with its principal office at the City and County of San Francisco, in said state.

III.

That the defendant, Petroleum Products Company, was at all times herein mentioned and is now a corporation duly organized and existing under and by virtue of the laws of the State of California and that it was and is a citizen of said state, with its principal office at the City and County of San Francisco, in said state.

IV.

That on the 14th day of October, 1918, plaintiff and defendant, Ozmo Oil Refining Company, entered into an agreement in writing reading as follows:

“This agreement, made and entered into this fifth (5th) day of September, Nineteen Hundred and Eighteen (1918) by and between the Ozmo Oil Refining Company, a corporation, duly organized and existing under and by virtue of the laws of the State of California, party of the first part, hereinafter called the ‘Seller,’ and Cotton and Company of Buffalo, New York, party of the second part, hereinafter called the ‘Buyer.’

WITNESSETH:

That in consideration of the promises and agreements hereinafter contained on the part of each of the parties hereto to be performed, the parties hereto do hereby [89] agree as follows, to wit:

The Seller agrees to sell and deliver to the Buyer, and the Buyer agrees to purchase and receive from the Seller approximately Seven Hundred (700) tons of One Hundred Five (105) to One Hundred Eight (108) melting point, White Semi-refined Wax, similar to sample submitted and packed in double headed barrels, (oil barrels, suitable for export).

DELIVERIES: Fifty (50) tons per month to be shipped during each and every month beginning with November, Nineteen Hundred and Eighteen (1918) and ending with December, Nineteen Hundred and Nineteen.

PRICE: The price of wax to be nine and one quarter cents ($9\frac{1}{4}\text{¢}$) per pound in car lots f. o. b. San Francisco, California. The above price being subject to a discount of one per cent (1%), shipments to be made sight draft attached to bill of lading, and payable upon representation. Irrevocable credit to be established in our favor and subject to our demand every thirty (30) days as wax is being shipped.

DAMAGE CLAUSE: Neither party hereto shall be held liable for any damage or delays occasioned by, or arising out of strikes, riots, fires, insurrections, labor disturbances, Seller's inability to secure cars for product referred to, or any other clause beyond Seller's control.

All deliveries hereunder, are to be made subject to Governmental regulations, or laws governing deliveries of products specified in this agreement, and any additional costs to the Seller for making deliveries because of such [90] regulations or laws shall be borne by the Buyer.

SUCCESSOR IN INTEREST: It is expressly understood and agreed that this agreement shall bind the successors and assigns of the prospective parties hereto without express mention.

Your acceptance of the above in the space provided below shall constitute that a binding contract between us.

OZMO OIL REFINING COMPANY,

Seller.

(Signed) E. SWIFT TRAIN.

COTTON AND COMPANY, BUFFALO,

Buyer.

(Signed) A. P. LEON,

RUTGER, BLEECKER AND COMPANY, Brokers,

(Signed) RUTGER BLEECKER.

V.

That the plaintiff complied with all and every condition and term of said contract on its part to be performed, but that the defendant, Ozmo Oil Refining Company, failed to deliver any of said wax mentioned in said contract and failed to comply with said contract in every and all particulars.

VI.

That more than three thousand dollars (\$3,000) is

involved in the controversy set forth in the complaint herein.

VII.

That on or about the 30th day of September, 1918, and prior to the execution and delivery of said agreement between the plaintiff and the defendant, Ozmo Oil Refining Company, plaintiff sold 600 tons of said wax to the Standard Oil Company of New York, the same to be delivered 50 tons monthly from January to December, 1919, at $10\frac{1}{8}$ cents a pound in car lots, f. o. b. San Francisco, California, terms cash, which [91] sale was not consummated because the defendant, Ozmo Oil Refining Company, did not deliver any of the wax mentioned in the agreement between itself and the plaintiff.

VIII.

That plaintiff prior to the execution and delivery of said agreement between itself and the defendant, Ozmo Oil Refining Company, sold 100 tons of said wax to Mitsui & Company the same to be delivered 50 tons monthly in November and December, 1918, at $10\frac{1}{2}$ cents a pound in car lots, f. o. b. San Francisco, California, which sale was not consummated because the defendant, Ozmo Oil Refining Company did not deliver any of the wax mentioned in the agreement between itself and the plaintiff.

IX.

That prior to the execution and delivery of said agreement between plaintiff and the defendant, Ozmo Oil Refining Company, said defendant well knew and plaintiff informed it that plaintiff was about to purchase the wax mentioned in said agreement for

resale and had resold the same, and that on September 17, 1918, plaintiff notified defendant, Ozmo Oil Refining Company, by letter that it intended to offer the wax in question for sale and on September 30, 1918, it telegraphed defendant, Ozmo Oil Refining Company, that it had sold the wax to responsible parties and on October 3, 1918, it wrote defendant, Ozmo Oil Refining Company, that the wax had been resold to responsible parties, which letter defendant, Ozmo Oil Refining Company, received on October 9, 1918, and on October 8, 1918, plaintiff wrote defendant, Ozmo Oil Refining Company, that it had sold the wax to the Standard Oil Company of New York and Mitsui & Company, which letter defendant, [92] Ozmo Oil Refining Company, received on October 14, 1918.

X.

That subsequent to the said transaction set forth in the complaint herein the defendant, Ozmo Oil Refining Company, consolidated with the defendant, Petroleum Products Company, and said defendant, Ozmo Oil Refining Company, assigned and transferred all of its assets to the defendant, Petroleum Products Company, and said Petroleum Products Company assumed the obligations of defendant, Ozmo Oil Refining Company, arising out of the contract hereinbefore set forth and said liabilities of the said defendant, Ozmo Oil Refining Company, and agreed to pay the same, but the same has not been paid or any part thereof.

XI.

That the total price to be paid by the plaintiff

under said contract for said 700 tons of match wax, at $9\frac{1}{4}\text{¢}$ a pound, was \$129,500; that the resale price of 600 tons of said wax to the Standard Oil Company of New York, at $10\frac{1}{8}\text{¢}$ a pound, was \$121,500; that the resale price of 100 tons of said wax, at $10\frac{1}{2}\text{¢}$ a pound, to Mitsui & Company was \$21,000; that the total resale price of said wax was \$142,500; that the difference between the contract price and the resale price was \$13,000; that said match wax was to be delivered monthly from November 30, 1918, to December 31, 1919, payable cash on delivery by said purchasers, Standard Oil Company of New York and Mitsui & Company of San Francisco; that the average due date of said payments of said wax would be May 31, 1919.

XII.

That plaintiff has been damaged by reason of the [93] premises in the sum of \$13,000, and interest from May 31, 1919, no part of which has been paid.

CONCLUSIONS OF LAW.

And as conclusions of law from the foregoing facts the Court finds and decides that plaintiff, Cotton and Company, Inc., is entitled to judgment against the Ozmo Oil Refining Company and Petroleum Products Company, the defendants, and each of them, in the sum of \$13,000 and interest from May 31, 1919, and costs to be taxed.

Let judgment be entered accordingly.

Done in open court this 18th day of May, 1921.

WILLIAM C. VAN FLEET,

Judge.

Stipulation Re Settling Bill of Exceptions.

IT IS HEREBY STIPULATED that the foregoing bill of exceptions may be settled.

WILLARD P. SMITH,

WALTON C. WEBB,

Attorneys for Plaintiff.

THOMAS, BEEDY & LANAGAN,

Attorneys for Defendant. [94]

Order Settling Bill of Exceptions.

The foregoing bill of exceptions having been examined by me and found to be full, true and correct, is hereby settled and allowed as such.

Dated: San Francisco, this 1st day of August, 1921.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Aug. 1, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [95]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,296.

COTTON & COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETROLEUM PRODUCTS COMPANY,
Defendants.

Assignment of Errors.

Come now the above-named defendants, Ozmo Oil Refining Company and Petroleum Products Company, and file the following assignment of errors upon which they, and each of them, will rely in the prosecution of the writ of errors in the above-entitled cause:

I.

The Court erred in approving and making the following finding of fact and in overruling defendants' objection to the same, which finding is finding of fact No. IV in the Court's decision embracing findings of fact and conclusions of law set forth in the bill of exceptions and is as follows, to wit:

"That on the 14th day of October, 1918, plaintiff and defendant, Ozmo Oil Refining Company, entered into an agreement in writing reading as follows:

"This agreement, made and entered into this fifth (5th) day of September, Nineteen Hundred and Eighteen (1918) by and between the Ozmo Oil Refining Company, a corporation, duly organized and existing under and by virtue of the laws of the [96] State of California, party of the first part, hereinafter called the "Seller," and Cotton and Company of Buffalo, New York, party of the second part, herein-after called the "Buyer,"

WITNESSETH:

That in consideration of the promises and agreements hereinafter contained on the part

of each of the parties hereto to be performed, the parties hereto do hereby agree as follows, to wit:

The Seller agrees to sell and deliver to the Buyer, and the Buyer agrees to purchase and receive from the Seller approximately Seven Hundred (700) tons of One Hundred Five (105) to One Hundred eight (108) melting point, White Semi-refined Wax, similar to sample submitted and packed in double headed barrels, (oil barrels, suitable for export).

DELIVERIES: Fifty (50) tons per month to be shipped during each and every month beginning with November, Nineteen Hundred and Eighteen (1918) and ending with December, Nineteen Hundred and Nineteen.

PRICE: The price of wax to be nine and one quarter cents ($9\frac{1}{4}\text{¢}$) per pound in car lots f. o.b. San Francisco, California. The above price being subject to a discount of one per cent (1%), shipments to be made sight draft attached to bill of lading, and payable upon presentation. Irrevocable credit to be established in our favor and subject to our demand every thirty (30) days as wax is being shipped.

DAMAGE CLAUSE: Neither party hereto shall be held liable for any damage or delays occasioned by, or arising out of strikes, riots, fires, insurrections, labor disturbances, Seller's inability to secure cars for product referred to, or any other clause beyond Seller's control.

All deliveries hereunder, are to be made sub-

ject to Governmental regulations, or laws governing deliveries of products specified in this agreement, and any additional cost to the Seller for making deliveries because of such regulations or laws shall be borne by the Buyer.

SUCCESSORS IN INTEREST: It is expressly understood and agreed that this agreement shall bind the successors and assigns of the prospective parties hereto without express mention.

Your acceptance of the above in the space provided below shall constitute that a binding contract between us.

OZMO OIL REFINING COMPANY,
Seller.

(Signed) E. SWIFT TRAIN,
COTTON AND COMPANY, BUF-
FALO,

Buyer.

(Signed) A. P. LEON.
RUTGER, BLEECKER AND COM-
PANY, Brokers,
(Signed) RUTGER BLEECKER.' " [97]

II.

The Court erred in approving and making the following finding of fact and in overruling defendants' objection to the same, which finding is finding of fact No. VII in the Court's decision embracing findings of fact and conclusions of law set forth in the bill of exceptions and is as follows, to wit:

"That on or about the 30th day of September, 1918, and prior to the execution and delivery of

said agreement between the plaintiff and the defendant, Ozmo Oil Refining Company, plaintiff sold 600 tons of said wax to the Standard Oil Company of New York, the same to be delivered 50 tons monthly from January to December, 1919, at 10 $\frac{1}{8}$ cents a pound in car lots, f. o. b. San Francisco, California, terms cash, which sale was not consummated because the defendant, Ozmo Oil Refining Company, did not deliver any of the wax mentioned in the agreement between itself and the plaintiff."

III.

The Court erred in approving and making the following finding of fact and in overruling defendants' objection to the same, which finding is finding of fact No. VIII in the Court's decision embracing findings of fact and conclusions of law set forth in the bill of exceptions and is as follows, to wit:

"That plaintiff prior to the execution and delivery of said agreement between itself and the defendant, Ozmo Oil Refining Company, sold 100 tons of said wax to Mitsui & Company, the same to be delivered 50 tons monthly in November and December, 1918, at 10 $\frac{1}{2}$ cents a pound in car lots, f. o. b. San Francisco, California, which sale was not consummated because the defendant, Ozmo Oil Refining Company, did not deliver any of the wax mentioned in the agreement between itself and the plaintiff."

IV.

The Court erred in approving and making the following finding of fact and in overruling defend-

ants' objection to the same, which finding is finding of fact No. IX in the Court's decision embracing findings of fact and conclusions of law set forth in [98] the bill of exceptions and is as follows, to wit:

"That prior to the execution and delivery of said agreement between plaintiff and the defendant, Ozmo Oil Refining Company, said defendant well knew and plaintiff informed it that plaintiff was about to purchase the wax mentioned in said agreement for resale and had resold the same, and that on September 17, 1918, plaintiff notified defendant, Ozmo Oil Refining Company, by letter that it intended to offer the wax in question for sale and on September 30, 1918, it telegraphed defendant, Ozmo Oil Refining Company, that it had sold the wax to responsible parties and on October 3, 1918, it wrote defendant Ozmo Oil Refining Company, that the wax had been resold to responsible parties, which letter defendant, Ozmo Oil Refining Company, received on October 9, 1918, and on October 8, 1918, plaintiff wrote defendant, Ozmo Oil Refining Company, that it had sold the wax to the Standard Oil Company of New York and Mitsui & Company, which letter defendant, Ozmo Oil Refining Company, received on October 14, 1918."

V.

The Court erred in approving and making the following finding of fact and in overruling defendants' objection to the same, which finding is finding of fact No. XII in the Court's decision embracing

findings of fact and conclusions of law set forth in the bill of exceptions and is as follows, to wit:

"That plaintiff has been damaged by reason of the premises in the sum of \$13,000, and interest from May 31, 1919, no part of which has been paid."

VI.

The Court erred in making and filing the following conclusions of law and in overruling defendants' objection to the same, which are the conclusions of law set forth in the decision of the Court embracing the findings of fact and conclusions of law as set forth in the bill of exceptions, and which are as follows, to wit:

"And as conclusions of law from the foregoing facts the Court finds and decides that plaintiff, Cotton and Company, Inc., is entitled to judgment against the Ozmo Oil Refining Company and Petroleum Products Company, the defendants, and each of them, in the sum of \$13,000, [99] and interest from May 31, 1919, and costs to be taxed."

VII.

The Court erred in entering judgment herein in favor of plaintiff and against defendants.

WHEREFORE the defendants above named, the plaintiffs in error, pray that the judgment herein be reversed.

THOMAS, BEEDY & LANAGAN,
Attorneys for Defendants.

[Endorsed]: Filed Aug. 1, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [100]

In the District Court of the United States, in and
for the Southern Division of the Northern
District of California, Second Division.

No. 16,296.

COTTON & COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETRO-
LEUM PRODUCTS COMPANY,

Defendants.

**Petition for Writ of Error and Order Directing Writ
to Issue.**

The above-named defendants, Ozmo Oil Refining Company and Petroleum Products Company, feeling themselves aggrieved by the judgment of the Court entered herein on the 18th day of May, 1921, come now by their attorneys, Messrs. Thomas, Beedy & Lanagan, and petition this Honorable Court for an order allowing said defendants to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States on that behalf made and provided.

THOMAS, BEEDY & LANAGAN,
Attorneys for Defendants.
ORDER.

Let a writ of error in the above cause issue as
[101] prayed for in the above petition.

Dated: August 1st 1921.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Aug. 1, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [102]

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

BALTIMORE, MARYLAND.

No. 31318-21. \$300.00.

In the District Court of the United States, Southern
Division, Northern District of California,
Second Division.

COTTON & COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETRO-
LEUM PRODUCTS COMPANY,
Defendants.

Costs on Appeal on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That We, Ozmo Oil Refining Company and Petroleum Products Company, as principals, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Cotton and Company, Inc., in the full and just sum of Three Hundred and No/100 (\$300.00) Dollars, to be paid to the said Cotton and Company, Inc., its certain attorney,

executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of August, in the year of our Lord one thousand nine hundred and twenty-one.

WHEREAS, lately at a District Court of the United States, Southern Division, Northern District, Second Division, in a suit depending in said court, between Cotton and Company, Inc., Plaintiff, vs. Ozmo Oil Refining Company and Petroleum Products Company, Defendants, a judgment was rendered against said Ozmo Oil Refining Company and Petroleum Products Company and the said Ozmo Oil Refining Company and Petroleum Products Company having obtained from said Court a [103] writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said Cotton and Company, Inc., citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth District.

NOW, the condition of the above obligation is such, that if the said Ozmo Oil Refining Company and Petroleum Products Company shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

OZMO OIL REFINING COMPANY. (Seal)

By J. P. ROTHWELL,
Secretary.

PETROLEUM PRODUCTS COMPANY.

(Seal)

By J. P. ROTHWELL,
Secretary.

UNITED STATES FIDELITY AND
GUARANTY COMPANY. (Seal)

By HENRY V. D. JOHNS,
By ERNEST W. SWINGLEY,
Attorneys in Fact.

(Premium charged for this bond is \$10.00 per annum.)

Approved:

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed Aug. 5, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [104]

In the District Court of the United States, in and
for the Southern Division of the Northern
District of California, Second Division.

No. 16,296.

COTTON & COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETRO-
LEUM PRODUCTS COMPANY,
Defendants.

Praecipe for Transcript of Record on Writ of Error.

To the Clerk of the Above-entitled Court:

Will you please certify to the Circuit Court of Appeals of the Ninth Circuit the following records herein, to wit:

The judgment-roll.

The bill of exceptions.

Assignment of errors.

Petition and order for writ of error, writ of error and citation.

THOMAS, BEEDY & LANAGAN,
Attorneys for Defendants and Plaintiffs in Error.

[Endorsed]: Filed Aug. 2, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [105]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 16,296.

COTTON & COMPANY, INC.,

Plaintiff,

vs.

OZMO OIL REFINING COMPANY and PETROLEUM PRODUCTS COMPANY,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred five (105) pages, numbered from 1 to 105, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$50.85; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereunto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of August, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [106]

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Ozmo Oil Refining Company and Petroleum Products Company, plaintiffs in error, and Cotton & Company, Inc., defendant in error, a manifest error hath happened, to the great damage of the said Ozmo Oil Refining Company and Petroleum Products Company, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at

the city and county of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 1st day of August, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

WM. C. VAN FLEET,
United States District Judge. [107]

Due service and receipt of a copy of the within writ of error admitted this 2d day of August, 1921.

WILLARD P. SMITH,
Attorney for Defts. in Error.

[Endorsed]: No. 16,296. United States District Court for the Northern District of California, Second Division. Ozmo Oil Refining Co. and Petroleum Products Co., Plaintiffs in Error, vs. Cotton & Company, Inc., Defendant in Error. Writ of Error. Filed Aug. 2, 1921. W. B. Maling. Clerk.
By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The Answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [108]

United States Circuit Court of Appeals for the Ninth Circuit.

OZMO OIL REFINING COMPANY and PETROLEUM PRODUCTS COMPANY,
Plaintiffs in Error,
vs.

COTTON & COMPANY, INC.,
Defendant in Error.

Citation on Writ of Error.

United States of America,—ss.
The President of the United States of America, to
Cotton & Company, Inc., GREETING:
You are hereby cited and admonished to be in,

and appear at, the United States Circuit Court of Appeals, for the Ninth Circuit, at the city and county of San Francisco, State of California, within thirty (30) days from the date of this writ pursuant to a writ of error filed in the office of the clerk of the District Court for the Southern Division of the Northern District of California, Second Division, wherein Ozmo Oil Refining Company and Petroleum Products Company are plaintiffs in error and you the defendant in error, and show cause, if any there be, why the judgment in the said writ of error mentioned and entered on the 18th day of May, 1921, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States of America, this [109] 1st day of August, 1921.

WM. C. VAN FLEET,
District Judge.

Attest: _____,
Clerk. [110]

[Endorsed]: No. 16,296. Circuit Court of the United States, Ninth Circuit, Northern District of California. Ozmo Oil Refining Company and Petroleum Products Company, Plaintiffs in Error, vs. Cotton & Company, Inc., Defendant in Error. Citation on Writ of Error. Filed Aug. 2, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3752. United States Circuit Court of Appeals for the Ninth Circuit. Ozmo Oil Refining Company, a Corporation, and Petroleum Products Company, a Corporation, Plaintiffs in Error, vs. Cotton & Company, Incorporated, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed August 13, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.